UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OGLALA SIOUX TRIBE, ALIGNING FOR RESPONSIBLE MINING;	)	
Petitioners,	)	No. 20-1489
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

PETITION FOR REVIEW

Pursuant to 42 U.S.C. § 2239, the Hobbs Act, 28 U.S.C. §§ 2341-2351, and Federal and D.C. Circuit Rule 15, notice is hereby given this 4th day of December, 2020, that Petitioner Oglala Sioux Tribe and Aligning for Responsible Mining, through undersigned counsel, hereby Petitions the United States Court of Appeals for the District of Columbia Circuit for review of:

1. The United States Nuclear Regulatory Commission's ("Commission") January, 2014 Final Environmental Impact Statement ("EIS") for the Dewey-Burdock In-Situ Recovery Project in Custer and Fall River Counties, South Dakota (Attachment 1) (Excerpt);

2. The Commission's April 8, 2014 Record of Decision ("ROD") for the Dewey-Burdock Uranium In-Situ Recovery Project (Attachment 2);

3. The Commission's April 8, 2014 Materials License No. SUA-1600, Docket No. 040-09075, to Powertech (USA) Inc. (Apr. 8, 2014)(Amendment #3 effective October 7, 2020) (Attachment 3); and

4. The Commission's December 23, 2016 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-16-20 (December 23, 2016) (Attachment 4).

5. Compliance with Judgment entered on a previous petition for review that was "dismissed in part for lack of jurisdiction, […] granted in part, and the case […] remanded to the Commission for further proceedings, in accordance with the opinion of the court filed" on July 20, 2018. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission, et al.,* Appeal No. 17-1059 (Attachment 5).

6. The Commission's July 24, 2018 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-18-07 (July 24, 2018) (Attachment 6).

7. The Commission's January 31, 2019 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery

Facility), Docket No. 40-9075-MLA, CLI-19-01 (January 31, 2019) (Attachment 7).

8. The Commission's September 26, 2019 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-19-09 (September 26, 2019) (Attachment 8).

9. The Commission's October 8, 2020 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-20-09 (October 8, 2020) (Attachment 9).

The Final EIS, ROD, identified Memoranda and Orders, Materials License, and actions underlying these final agency actions violate this Court's Judgment and remand opinion, the Administrative Procedure Act, 5 U.S.C. § 706, the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.*, the Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, and implementing regulations.

Respectfully submitted,

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Filed this 4th day of December, 2020

CERTIFICATE OF SERVICE

I, Jeffrey C. Parsons, hereby certify that I caused a true and correct copy of Petitioner's Petition for Review to be served by U.S. mail on the following this 4th day of December, 2020:

United States Nuclear Regulatory Commission, Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555

Hon. Annette Vietti-Cook, Secretary, United States NRC
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/s/ Jeffrey C. Parsons
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U.S.NRC
United States Nuclear Regulatory Commission
Protecting People and the Environment

NUREG-1910
Supplement 4, Vol. 1

Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota

Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities

Final Report

Chapters 1 to 5

Office of Federal and State Materials and
Environmental Management Programs

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NUREG-1910
Supplement 4, Vol. 1

Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota

Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities

Final Report

Chapters 1 to 5

Manuscript Completed: January 2014
Date Published: January 2014

Office of Federal and State Materials and
Environmental Management Programs

ABSTRACT

The U.S. Nuclear Regulatory Commission (NRC) issues licenses for the possession and use of source material provided that proposed facilities meet NRC regulatory requirements and will be operated in a manner that is protective of public health and safety and the environment. Under the NRC environmental protection regulations in 10 CFR Part 51, which implement the National Environmental Policy Act of 1969 (NEPA), issuance of a license to possess and use source material for uranium milling, as defined in 10 CFR Part 40, requires an environmental impact statement (EIS) or a supplement to an EIS.

In May 2009, NRC issued NUREG–1910, the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Facilities (GEIS) (NRC, 2009). In the GEIS, NRC assessed the potential environmental impacts from the construction, operation, aquifer restoration, and decommissioning of an *in-situ* leach uranium recovery facility [also known as an *in-situ* recovery (ISR) facility] located in four specified geographic regions of the western United States. As part of this assessment, NRC determined which potential impacts will be essentially the same for all ISR facilities and which will result in varying levels of impact for different facilities, thus requiring further site-specific information to determine potential impacts. The GEIS provides a starting point for NRC NEPA analyses for site-specific license applications for new ISR facilities, as well as for applications to amend or renew existing ISR licenses.

By letter dated August 10, 2009, Powertech (USA), Inc. (Powertech, referred to herein as the applicant) submitted a license application to NRC for a new source material license for the Dewey-Burdock ISR Project. The proposed Dewey-Burdock ISR Project will be located in Fall River and Custer Counties, South Dakota, which is in the Nebraska-South Dakota-Wyoming Uranium Milling Region identified in the GEIS. The NRC staff prepared this Supplemental Environmental Impact Statement (SEIS) to evaluate the potential environmental impacts from the applicant's proposal to construct, operate, conduct aquifer restoration, and decommission an ISR uranium facility at the proposed Dewey-Burdock ISR Project. This SEIS describes the environment potentially affected by the proposed site activities, presents the potential environmental impacts resulting from reasonable alternatives to the proposed action, and describes the applicant's environmental monitoring program and proposed mitigation measures. In conducting its analysis in this SEIS, the NRC staff evaluated site-specific data and information to determine whether the applicant's proposed activities and site characteristics were consistent with those evaluated in the GEIS. NRC staff then determined relevant sections, findings, and conclusions in the GEIS that could be incorporated by reference and areas that required additional analysis. Based on its environmental review, the NRC staff recommendation is that a source material license for the proposed action be issued as requested, unless safety issues mandate otherwise.

Paperwork Reduction Act Statement

This NUREG contains and references information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These information collections were approved by the Office of Management and Budget (OMB), approval numbers 3150-0014, 3150-0020, 3150-0021, and 3150-0008.

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References

10 CFR Part 40. Code of Federal Regulations, Title 10, *Energy*, Part 40. "*Domestic Licensing of Source Material*." Washington, DC: U.S. Government Printing Office.

10 CFR Part 51. Code of Federal Regulations, Title 10, *Energy*, Part 51. "*Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions*." Washington, DC: U.S. Government Printing Office.

NRC. NUREG–1910, "Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities." ML091480244, ML091480188. Washington, DC: NRC. May 2009.

U.S. NUCLEAR REGULATORY COMMISSION
RECORD OF DECISION
FOR THE DEWEY-BURDOCK URANIUM IN-SITU RECOVERY PROJECT
IN CUSTER AND FALL RIVER COUNTIES, SOUTH DAKOTA

Introduction:

The U.S. Nuclear Regulatory Commission (NRC) staff prepared this record of decision (ROD) for the proposed Dewey-Burdock Uranium In-Situ Recovery (ISR) Project in Custer and Fall River Counties, South Dakota. This ROD satisfies Section 51.102(a) of Title 10 of the *Code of Federal Regulations* (10 CFR), which states that "a Commission decision on any action for which a final environmental impact statement has been prepared shall be accompanied by or include a concise public record of decision."

In January 2014, the NRC staff issued a Final Supplemental Environmental Impact Statement (Final SEIS) (NRC, 2014a-b) in support of the NRC's review of the Powertech (USA) Inc. (Powertech or "applicant") license application. Powertech's application, which it submitted in 2009 and later amended, is for a new source materials license for the Dewey-Burdock ISR Project (Powertech, 2009a-c). The Dewey-Burdock Final SEIS is Supplement 4 to the NRC staff's *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (NUREG-1910) (known as the GEIS) (NRC, 2009).

This ROD has been prepared pursuant to NRC regulations at 10 CFR § 51.102(b) and § 51.103(a)(1)-(4). Additionally, pursuant to 10 CFR § 51.103(c), this ROD incorporates by reference materials contained in the Final SEIS.

On January 5, 2010, the NRC staff notified the public of Powertech's application for a materials license. The NRC staff also informed members of the public that they could request a hearing in connection with Powertech's application. *Notice of Opportunity for Hearing, License Application Request of Powertech (USA) Inc. Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, SD*, 75 Fed. Reg. 467. The NRC's Atomic Safety and Licensing Board Panel (ASLBP), an independent, trial-level adjudicatory body, granted hearing requests from the Oglala Sioux Tribe and a group that is now referred to as the Consolidated Intervenors (ASLBP, 2010). The ASLBP has scheduled an oral hearing for August 2014, and the hearing may involve environmental issues. This ROD may be revised in accordance with any ASLBP decision on those issues.

The Decision:

This ROD documents the NRC staff's decision to issue a materials license to Powertech for its proposed Dewey-Burdock ISR Project in Custer and Fall River Counties, South Dakota (Materials License SUA-1600; NRC, 2014c). The license will authorize Powertech to possess uranium source and byproduct materials at the Dewey-Burdock facility. Under its license, Powertech will be able to construct and operate its facilities as proposed in its license application and under the conditions in its NRC license.

The proposed Dewey-Burdock ISR Project will be located approximately 21 kilometers (13 miles) north-northwest of Edgemont, South Dakota, in southern Custer and northern Fall River Counties. The proposed facility will encompass approximately 4,282 hectares (10,580 acres), which consists of two contiguous mining units, the Burdock Unit and the Dewey Unit. Powertech intends to recover uranium and produce yellowcake at the Dewey-Burdock site. Powertech's proposed activities include construction, operation, aquifer restoration, and decommissioning of its ISR facility. In addition, Powertech has proposed that liquid wastewater

generated during uranium recovery be disposed of through one of the following methods: (i) deep well disposal via Class V injection wells, (ii) land application, or (iii) a combination of deep well disposal and land application. Together, these actions represent the "proposed action" evaluated in the Final SEIS.

During the ISR process, an oxidant-charged solution, called a lixiviant, will be injected into the production zone aquifer (uranium orebody) through injection wells. The lixiviant will be composed of native groundwater (from the production zone aquifer) and a combination of carbon dioxide and gaseous oxygen. As the lixiviant circulates through the production zone, it will oxidize and dissolve the mineralized uranium, which is present in a reduced chemical state. The resulting uranium-rich solution will be drawn to recovery wells by pumping and then transferred to a processing facility via a network of underground pipelines. At the processing facility, the uranium will be removed from solution via ion exchange. The resulting barren solution will then be recharged with the oxidant and reinjected to recover more uranium.

Alternatives Considered in Reaching the Decision:
The NRC staff analyzed a number of alternatives in detail before deciding to issue Powertech a license. These alternatives included the proposed action in the license application (including the three alternative wastewater disposal options) and the no-action alternative. Under the no-action alternative, the NRC staff would not approve Powertech's license application and, as a result, Powertech would not construct or operate the proposed Dewey-Burdock ISR Project. The no-action alternative served as a baseline for comparing the potential environmental impacts of the proposed action. In Volume 1 of the Final SEIS (NRC, 2014a), the NRC staff describes both the proposed action and the no-action alternative (Section 2.1) and compares their potential environmental impacts (Section 2.3).

The NRC staff considered several other alternatives when evaluating the proposed action. The staff eliminated these alternatives from detailed analysis, however, for reasons discussed in Volume 1, Section 2.2, of the Final SEIS (NRC, 2014a). These alternatives included conventional uranium mining techniques and associated uranium milling alternatives (conventional milling and heap leaching) for the proposed project site, the use of alternative lixiviants (acid- or ammonia-based lixiviants), alternative project sites, and alternative well completion methods at the proposed project site.

In addition, the NRC staff considered alternative methods for disposing of liquid waste. The staff discusses these alternatives in Volume 1, Section 2.1.1.2, of the Final SEIS (NRC, 2014a). Specifically, the NRC staff considered what would occur if the U.S. Environmental Protection Agency does not grant Powertech an underground injection control (UIC) permit for Class V injection wells. The staff determined that Powertech would in that case need to rely solely on land application for liquid wastewater disposal or seek an NRC license amendment approving another disposal option. Thus, in Final SEIS Section 2.1.1.2 the staff evaluates the use of evaporation ponds and surface water discharge, which have historically been used by ISR facilities to manage and dispose of liquid wastes. The staff also compares characteristics of these two methods with those of Class V well injection and land application. Further, in Section 4.14.1.4 of the Final SEIS (NRC, 2014a), the staff evaluates the potential environmental impacts of using evaporation ponds and surface water discharge.

The alternatives identified above were included in the range of alternatives analyzed in the Final SEIS.

Preferences Among Alternatives Based on Relevant Factors:
In Volume 1, Chapters 4 and 5, of the Final SEIS (NRC, 2014a), the NRC staff assessed the potential environmental impacts from the construction, operation, aquifer restoration, and decommissioning of the proposed Dewey-Burdock ISR Project. The staff also assessed the potential impacts of three alternative wastewater disposal options and the no-action alternative. The NRC staff assessed the impacts of these alternatives on land use, transportation, geology and soils, water resources, ecological resources, air quality, noise, historical and cultural resources, visual and scenic resources, socioeconomics, environmental justice, public and occupational health and safety, and waste management. The staff compared the potential environmental impacts of the proposed action and the no-action alternative in Volume 1, Section 2.3, of the Final SEIS (NRC, 2014a). Additionally, in Volume 2, Chapter 8, of the Final SEIS (NRC, 2014b), the staff analyzed the benefits and costs of the proposed action and no-action alternative. In preparing the Final SEIS, the NRC staff also considered, evaluated, and addressed the public comments received on the Draft SEIS published on November 26, 2012 (77 Fed. Reg. 70,486).

After weighing the impacts of the proposed action and comparing the alternatives, the NRC staff determined that the proposed action is the preferred alternative and that the NRC should issue a source materials license for the proposed action. The NRC staff based its decision on: (i) the license application (including the applicant's environmental report) (Powertech, 2009a-c); (ii) the applicant's responses to NRC staff requests for additional information (Powertech, 2010a-c; 2011; 2012a-c; 2013); (iii) the NRC staff's consultations with Federal, State, and local agencies and with Native American Tribes; (iv) independent NRC staff review; (v) NRC staff consideration of comments received on the Draft SEIS (see Appendix E in Volume 2 of the Final SEIS (NRC, 2014b)); and (vi) the assessments in the NRC staff's Final SEIS (NRC, 2014a-b) and Safety Evaluation Report (NRC, 2014d) for the Dewey-Burdock ISR Project and in the GEIS (NRC, 2009).

Measures to Avoid or Minimize Environmental Harm from the Alternative Selected:
As described below, the NRC has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected. In its license application (Powertech, 2009a-c) and in response to NRC staff requests for additional information (Powertech, 2010a–c; 2011; 2012a-c), the applicant identified mitigation measures to control and minimize potential adverse environmental impacts from construction, operation, aquifer restoration, and decommissioning of the Dewey-Burdock ISR Project. The applicant also identified environmental measures and monitoring programs to verify compliance with standards for the protection of worker health and safety in operational areas and for protection of the public and environment beyond the facility boundary. As discussed below, the applicant's mitigation measures and monitoring programs are included by the NRC staff as conditions in the materials license.

The mitigation measures identified by the applicant are listed for each resource area in Volume 2, Table 6.2-1, Section 6.2, of the Final SEIS (NRC, 2014b). Because many of the applicant's proposed mitigation measures apply to all four phases of the ISR process, they are listed together in the table. The applicant's environmental measures and monitoring programs for the Dewey-Burdock ISR Project are described in detail in Volume 2, Chapter 7, of the Final SEIS (NRC, 2014b), organized as follows: Radiological Monitoring (Section 7.2), Physicochemical Monitoring (Section 7.3), Ecological Monitoring (Section 7.4), Land Application Monitoring (Section 7.5), and Class V Deep Injection Well Monitoring (Section 7.6). These monitoring programs will provide data on operational and environmental conditions so that prompt corrective actions can be implemented when adverse conditions are detected. In this regard,

these programs will help to limit potential environmental impacts at the Dewey-Burdock ISR Facility and the surrounding areas.

Administrative Condition 9.2 of Materials License SUA-1600 (NRC, 2014c) requires Powertech to conduct operations in accordance with the commitments, representations, and statements contained in its license application and supplementary submittals. License Condition 9.2 incorporates by reference Powertech's approved application and the supplements to its application. Powertech's commitments, representations, and statements include the mitigation measures and monitoring programs described above. Additional license conditions relevant to mitigation and monitoring include: mitigation of potential impacts to cultural resources (Administrative Condition 9.8); documentation in association with monitoring programs (Administrative Condition 9.10); and implementation of a preoperational and operational sampling plan if land application is utilized (Operations, Controls, Limits, and Restrictions – Standard Condition 10.12).

References:

75 Fed. Reg. 467. *Federal Register*, Vol. 75, No. 2, p. 467–471. "Notice of Opportunity for Hearing, License Application Request of Powertech (USA) Inc. Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, SD, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation." January 5, 2010.

77 Fed. Reg. 70,486. *Federal Register*, Vol. 77, No. 227, p. 70486-70487. "Supplemental Environmental Impact Statement for Proposed Dewey-Burdock In-Situ Uranium Recovery Project in Custer and Fall River Counties, SD." November 26, 2012.

ASLBP (Atomic Safety and Licensing Board). "Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing)." In the Matter of Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility) Docket No. 40-9075-MLA. ASLBP No. 10-898-02-MLA BD01. ADAMS Accession No. ML102170300. Washington, DC: U.S. Nuclear Regulatory Commission, ASLBP. August 5, 2010.

NRC (U.S. Nuclear Regulatory Commission). NUREG-1910, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota." Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities. Final Report. Supplement 4, Volume 1. ADAMS Accession No. ML14024A477. Washington, DC: NRC, Office of Federal and State Materials and Environmental Management Programs. January 2014a.

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NRC. Safety Evaluation Report (Revised) for the Dewey-Burdock Project, Fall River and Custer Counties, South Dakota." Materials License No. SUA-1600. ADAMS Accession No. ML14043A347. Washington, DC: NRC, Office of Federal and State Materials and Environmental Management Programs. March 2014d.

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Powertech. "Re: Powertech (USA) Inc.'s Supplemental Sampling Plan and Responses to Comments Regarding Draft License SUA-1600, Dewey-Burdock Project, Docket No. 40-9075, TAC No. J00606." Letter from R. Blubaugh, Vice President—Environmental, Health and Safety Resources, Powertech to R. Burrows, NRC. ADAMS Accession no. ML12305A056. October 19, 2012a.

Powertech. "Dewey-Burdock Project Groundwater Discharge Plan, Custer and Fall River Counties, South Dakota." ADAMS Accession Nos. ML12195A039 and ML12195A040. Edgemont, South Dakota: Powertech. March 2012b.

Powertech. "Dewey-Burdock Project Emissions Inventory Revisions." Email (July 31) from R. Blubaugh to Bradley Werling, Southwest Research Institute®. ADAMS Accession No. ML12216A220. South Dakota: Powertech. 2012c.

Powertech. "Dewey-Burdock Project, Application for NRC Uranium Recovery License, Fall River and Custer Counties, South Dakota, Technical Report RAI Responses, June, 2011." ADAMS Accession No. ML112071064. Greenwood Village, Colorado: Powertech. 2011.

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Powertech. "Subject: Powertech (USA), Inc.'s Responses to the U.S. Nuclear Regulatory Commission (NRC) Staff's Verbal and Email Requests for Clarification of Selected Issues Related to the Dewey-Burdock Uranium Project Environmental Review Docket No. 40-9075; TAC No. J 00533." Letter (November 4) from R. Blubaugh, Vice President-Environmental Health and Safety Resources to R. Burrows, Project Manager, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission. ADAMS Accession No. ML110820582. Greenwood Village, Colorado: Powertech. 2010b.

Powertech. "Subject: Powertech (USA), Inc.'s Responses to the U.S. Nuclear Regulatory Commission (NRC) Staff's Verbal Request for Clarification of Response Regarding Inclusion of Emissions from Drilling Disposal Wells; Dewey-Burdock Uranium Project Environmental Review Docket No. 40-9075; TAC No. J 00533." Letter (November 17) from R. Blubaugh, Vice President-Environmental Health and Safety Resources to R. Burrows, Project Manager, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission. ADAMS Accession No. ML103220208. Greenwood Village, Colorado: Powertech. 2010c.

Powertech. "Dewey-Burdock Project, Application for NRC Uranium Recovery License, Fall River and Custer Counties, South Dakota—Environmental Report." Docket No. 040-09075. ADAMS Accession No. ML092870160. Greenwood Village, Colorado: Powertech. August 2009a.

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Docket No.: 04009075
License No.: SUA-1600

FOR THE NUCLEAR REGULATORY COMMISSION

Date: **4/8/14**

/RA/
Andrew Persinko, Deputy Director
Decommissioning and Uranium Recovery
Licensing Directorate
Division of Waste Management
and Environmental Protection
Office of Federal and State Materials
and Environmental Management Programs

NRC FORM 374

U.S. NUCLEAR REGULATORY COMMISSION

MATERIALS LICENSE

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and the applicable parts of Title 10, Code of Federal Regulations, Chapter I, Parts 19, 20, 30, 31, 32, 33, 34, 35, 36, 39, 40, 70, and 71, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, possess, and transfer byproduct, source, and special nuclear material designated below; to use such material for the purpose(s) and at the place(s) designated below; to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified below.

Licensee	
1. Powertech (USA) Inc.	3. License Number SUA-1600, Amendment No. 3
2. P.O. Box 448 Edgemont, SD 57735	4. Expiration Date April 8, 2024
	5. Docket No. 40-09075
[Applicable amendments: 2, 3]	Reference No.

6. Byproduct Source, and/or Special Nuclear Material	7. Chemical and/or Physical Form	8. Maximum amount that Licensee May Possess at Any One Time Under This License
a. Natural Uranium	Any	a. Unlimited
b. Byproduct material as defined in 10 CFR 40.4	Unspecified	b. Quantity generated under operation authorized by this license

SECTION 9: Administrative Conditions

9.1 The authorized place of use shall be the licensee's Dewey-Burdock Project in Fall River and Custer Counties, South Dakota. The licensee shall conduct operations within the license boundaries shown in Figure 1.4-1 of the approved license application.

9.2 The licensee shall conduct operations in accordance with the commitments, representations, and statements contained in the license application dated February 28, 2009 (Accession No. ML091200014), which is supplemented by the submittals dated August 10, 2009 (Accession No. ML092870160); June 28, 2011 (Accession No. ML112071064); February 27, 2012 (Accession No. ML120620195); April 11, 2012 (Accession No. ML121030013); June 13, 2012 (Accession No. ML12173A038); June 27, 2012 (Accession No. ML12179A534); October 19, 2012 (Accession No. ML12305A056); July 3, 2014 (Accession No. ML14191A034); and September 25, 2014 (Accession No. ML14295A299).

The approved application and supplements are, hereby, incorporated by reference, except where superseded by specific conditions in this license. The licensee must maintain at least one copy of its complete, updated, and approved license application at the licensed facility. Unless otherwise specified, all references to the "license application" refer to the current, updated application including updates made per License Condition (LC) 9.4.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

Whenever the words "will" or "shall" are used in the above referenced documents, it shall denote a requirement. The use of "verification" in this license with respect to a document submitted for NRC staff review means a written acknowledgement by U.S. Nuclear Regulatory Commission (NRC) staff that the specified submitted material is consistent with commitments in the approved license application, or requirements in a license condition or regulation. A verification will not require a license amendment.

[Applicable amendment: 1]

9.3 All written notices and reports sent to the U.S. Nuclear Regulatory Commission (NRC) as required under this license and by regulation shall be addressed as follows: ATTN: Document Control Desk, Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. An additional copy shall be submitted to: Deputy Director, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Two White Flint North, 11545 Rockville Pike, Mail Stop T-8F5, Rockville, MD 20852-2738. Incidents and events that require telephone notification shall be made to the NRC Operations Center at (301) 816-5100 (collect calls accepted).

9.4 Change, Test, and Experiment License Condition

A) The licensee may, without obtaining a license amendment pursuant to 10 CFR 40.44, and subject to conditions specified in (B) of this condition:

i Make changes to the facility as described in the license application;

ii Make changes to the procedures as described in the license application; and

iii Conduct tests or experiments not described in the license application.

B) The licensee shall obtain a license amendment pursuant to 10 CFR 40.44 prior to implementing a proposed change, test, or experiment if the change, test, or experiment would:

i Result in more than a minimal increase in the frequency of occurrence of an accident previously evaluated in the license application;

ii Result in more than a minimal increase in the likelihood of occurrence of a malfunction of a facility structure, equipment, or monitoring system (SEMS) important to safety previously evaluated in the license application;

iii Result in more than a minimal increase in the consequences of an accident previously evaluated in the license application;

iv Result in more than a minimal increase in the consequences of a malfunction of an SEMS previously evaluated in the license application;

v Create a possibility for an accident of a different type than any previously evaluated in the license application;

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

vi Create a possibility for a malfunction of an SEMS with a different result than previously evaluated in the license application;

vii Result in a departure from the method of evaluation described in the license application (as updated) used in establishing the final safety evaluation report (FSER), environmental impact statement (EIS), environmental assessment (EA) or technical evaluation reports (TERs) or other analysis and evaluations for license amendments.

viii For purposes of this paragraph as applied to this license, SEMS means any SEMS that has been referenced in a staff SER, TER, EA, or EIS and supplements and amendments thereof.

C) Additionally, the licensee must obtain a license amendment unless the change, test, or experiment is consistent with the NRC staff's previous conclusions, or the basis of or analysis leading to those conclusions, regarding actions, designs, or design configurations analyzed and selected in the site or facility SER, TER, and EIS or EA. This includes all supplements and amendments to the license, as well as all SERs, TERs, EAs, and EISs associated with amendments to this license.

D) The licensee's determinations concerning (B) and (C) of this condition shall be made by a Safety and Environmental Review Panel (SERP). The SERP shall consist of a minimum of three individuals. One member of the SERP shall have expertise in management (e.g., a Plant Manager) and shall be responsible for financial approval for changes; one member shall have expertise in operations and/or construction and shall have responsibility for implementing any operational changes; and one member shall be the radiation safety officer (RSO) or equivalent, with the responsibility of assuring changes conform to radiation safety and environmental requirements. Additional members may be included in the SERP, as appropriate, to address technical aspects such as groundwater or surface water hydrology, specific earth sciences, and other technical disciplines. Temporary members or permanent members, other than the three above-specified individuals, may be consultants.

E) The licensee shall maintain records of any changes made pursuant to this condition until license termination. These records shall include written safety and environmental evaluations made by the SERP that provide the basis for determining changes are in compliance with (B) of this condition. The licensee shall furnish, in an annual report to the NRC, a description of such changes, tests, or experiments, including a summary of the safety and environmental evaluation of each. In addition, the licensee shall annually submit to the NRC changed pages, which shall include both a change indicator for the area changed (e.g., a bold line vertically drawn in the margin adjacent to the portion actually changed) and a page change identification (date of change, change number, or both) for the operations plan and reclamation plan of the approved license application that reflects changes made under this condition.

9.5 Financial Assurance. The licensee shall maintain an NRC-approved financial surety arrangement, consistent with 10 CFR Part 40, Appendix A, Criterion 9, to adequately cover the estimated costs of decommissioning and decontamination, if accomplished by a third party. This surety arrangement shall cover offsite disposal of radioactive solid process or evaporation pond residues, and groundwater restoration pursuant to 10 CFR Part 40, Appendix A Criterion 5B (5). The surety shall also include the costs associated with all soil and water sampling analyses necessary to confirm the accomplishment of decontamination.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

Proposed annual updates to the financial assurance amount, consistent with 10 CFR Part 40, Appendix A, Criterion 9, shall be provided to the NRC 90 days prior to the anniversary date. The financial assurance anniversary date for the Dewey-Burdock Project will be the date on which the first surety instrument is approved by the NRC. If the NRC has not approved a proposed revision 30 days prior to the expiration date of the existing financial assurance arrangement, the licensee shall extend the existing arrangement, prior to expiration, for 1 year. Along with each proposed revision or annual update of the financial assurance estimate, the licensee shall submit supporting documentation, showing a breakdown of the costs and the basis for the cost estimates with adjustments for inflation, maintenance of a minimum 15-percent contingency of the financial assurance estimate, changes in engineering plans, activities performed, and any other conditions affecting the estimated costs for site closure. The licensee shall calculate pore volumes based on the actual screen lengths of injection and production wells and not by ore zone thickness.

Within 90 days of NRC approval of a revised closure (decommissioning) plan and its cost estimate, the licensee shall submit, for NRC review and approval, a proposed revision to the financial assurance arrangement if estimated costs exceed the amount covered in the existing arrangement. The revised financial assurance instrument shall then be in effect within 30 days of written NRC approval of the documents.

At least 90 days prior to beginning construction associated with any planned expansion or operational change that was not included in the annual financial assurance update, the licensee shall provide, for NRC review and approval, an updated estimate to cover the expansion or change. The licensee shall also provide the NRC with copies of financial-assurance-related correspondence submitted to the U.S. Environmental Protection Agency, a copy of the U.S. Environmental Protection Agency's financial assurance review, and the final approved financial assurance arrangement. The licensee also must ensure that the financial assurance instrument, where authorized to be held by a State or other Federal agency, identifies the NRC-related portion of the instrument and covers the activities discussed earlier in this license condition. The basis for the cost estimate is the NRC-approved site decommissioning and reclamation plan and any NRC approved revisions to the plan. Reclamation and decommissioning cost estimates and annual updates should follow the outline in Appendix C, "Recommended Outline for Site-Specific In Situ Leach Facility Reclamation and Stabilization Cost Estimates," to NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications—Final Report."

The licensee shall continuously maintain an approved surety instrument for the Dewey-Burdock Project in the amount of no less than $1,620,000, in favor of the NRC except for plugging and abandoning of all Class III and Class V injection wells, which will be maintained in favor of the U.S. Environmental Protection Agency.

The surety instrument shall be submitted for NRC staff review and approval 90 days prior to commencing operations.

[Applicable amendment: 1]

9.6 Release of surficially contaminated equipment, materials, or packages for unrestricted use shall be in accordance with the NRC guidance document "Guidelines for Decontamination of Facilities and Equipment Prior to Release for Unrestricted Use or Termination of Licenses for Byproduct, Source, or Special Nuclear Material," (the Guidelines) dated April 1993 (ADAMS Accession No. ML003745526) or suitable alternative procedures approved by NRC prior to any such release.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

Where surface contamination by both alpha- and beta-gamma-emitting nuclides exists, the limits established for alpha- and beta-gamma-emitting nuclides shall apply independently.

Personnel performing contamination surveys for items released for unrestricted use shall meet the qualifications for health physics technicians or radiation safety officers defined in Regulatory Guide 8.31 (as revised). Personal effects (e.g., notebooks and flash lights) which are hand carried need not be subjected to the qualified individual survey or evaluation, but these items should be subjected to the same survey requirements as the individual possessing the items.

Regulatory Guide 8.30 (as revised), Table 2, shall apply to the removal to unrestricted areas of equipment, materials, or packages that have the potential for accessible surface contamination levels above background. The licensee shall submit to the NRC for review and written verification a contamination control program. The program shall provide sufficient detail to demonstrate how the licensee will maintain radiological controls over the equipment, materials, or packages that have the potential for accessible surface contamination levels above background, until they have been released for unrestricted use as specified in the Guidelines, and what methods will be used to limit the spread of contamination to unrestricted areas. The contamination control program shall demonstrate how the licensee will limit the spread of contamination when moving or transporting potentially contaminated equipment, materials, or packages (pumps, valves, piping, filters, etc.) from restricted or controlled areas through uncontrolled areas. The licensee shall receive written verification of the licensee's contamination control program from the NRC prior to implementing such a program in lieu of the recommendations in RG 8.30.

The licensee may identify a qualified designee(s) to perform surveys, associated with the licensee's contamination control program when moving or transporting potentially contaminated equipment, materials, or packages from restricted or controlled areas through uncontrolled areas and back into controlled or restricted areas. The qualified designee(s) shall have education, training, and experience, in addition to general radiation worker training, as specified by the licensee. The education, training, and experience required by the licensee for qualified designees shall be submitted to the NRC for review and written verification. The licensee shall receive written verification of its qualified designee(s) training program from the NRC prior to its implementation.

9.7 The licensee shall follow the guidance set forth in the current versions of NRC Regulatory Guides 8.22, "Bioassay at Uranium Recovery Facilities," 8.30, "Health Physics Surveys in Uranium Recovery Facilities," and 8.31, "Information Relevant to Ensuring that Occupational Radiation Exposure at Uranium Recovery Facilities will be As Low As Is Reasonably Achievable (ALARA)" or NRC-approved equivalent measures.

9.8 Cultural Resources. Before engaging in any developmental activity not previously assessed by the NRC, the licensee shall administer a cultural resource inventory if such survey has not been previously conducted and submitted to the NRC. All disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act (as amended) and its implementing regulations (36 CFR Part 800), as well as the Archaeological Resources Protection Act (as amended) and its implementing regulations (43 CFR Part 7).

In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with 36 CFR Part 800, and no disturbance of the area shall occur until the

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

licensee has received authorization from the NRC, the South Dakota State Historic Preservation Officer, and the Bureau of Land Management (if on Bureau of Land Management Land) to proceed.

The licensee shall comply with the terms and conditions included in a Programmatic Agreement (PA) executed on April 7, 2014 (ADAMS Accession No. ML14066A344) that was developed to protect cultural resources within the Dewey-Burdock project boundary. If the PA is terminated, the licensee shall comply with Stipulation 16(c) of the PA. Therefore, in the event the PA is terminated, Powertech is required to follow the terms and conditions provided in the PA for on-going ground-disturbing activities, and is not permitted to begin ground-disturbing activities in unevaluated areas, until the NRC completes consultation and a new PA is executed, or the NRC has requested, taken into account, and responded to the comments of the ACHP under 36 CFR § 800.7(c)(4).

9.9 The licensee shall dispose of solid byproduct material from the Dewey-Burdock Project at a site that is licensed by the NRC or an NRC Agreement State to receive byproduct material. The licensee's approved solid byproduct material disposal agreement must be maintained on site. In the event that the agreement expires or is terminated, the licensee shall notify the NRC within seven working days after the date of expiration or termination. A new agreement shall be submitted for NRC staff review and written verification within 90 days after expiration or termination, or the licensee will be prohibited from further lixiviant injection.

9.10 The results of the following activities, operations, or actions shall be documented: sampling; analyses; surveys or monitoring; survey/ monitoring equipment calibrations; reports on audits and inspections; all meetings and training courses; and any subsequent reviews, investigations, or corrective actions required by NRC regulation or this license. Unless otherwise specified in a license condition or applicable NRC regulation, all documentation required by this license shall be maintained at the site until license termination, and is subject to NRC review and inspection.

9.11 The licensee is hereby exempted from the requirements of 10 CFR 20.1902(e) for areas within the facility, provided that all entrances to the facility are conspicuously posted with the words, "CAUTION: ANY AREA WITHIN THIS FACILITY MAY CONTAIN RADIOACTIVE MATERIAL."

SECTION 10: Operations, Controls, Limits, and Restrictions

Standard Conditions

10.1 The licensee shall use a lixiviant composed of native groundwater and a combination of carbon dioxide and gaseous oxygen, as specified in the approved license application.

10.2 Facility Throughput. The Dewey-Burdock Project throughput shall not exceed an average annual flow rate of 4,000 gallons per minute, excluding restoration flow. The annual production of yellowcake shall not exceed 1 million pounds.

10.3 At least 12 months prior to initiation of any planned final site decommissioning, reclamation, or groundwater restoration, the licensee shall submit a detailed decommissioning plan for NRC staff review and approval. The plan shall represent as-built conditions at the Dewey-Burdock Project.

NRC FORM 374A U.S. NUCLEAR REGULATORY COMMISSION	Page 7 of 15 Pages
MATERIALS LICENSE **SUPPLEMENTARY SHEET**	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

10.4 The licensee shall have written standard operating procedures (SOPs) prior to operations for:

A) All routine operational activities involving radioactive and nonradioactive materials associated with licensed activities that are handled, processed, stored, or transported by employees;

B) All routine nonoperational activities involving radioactive materials, including in-plant radiation protection, quality assurance for the respirator program, and environmental monitoring; and

C) Emergency procedures for potential accidents/unusual occurrences, including significant equipment or facility damage, pipe breaks and spills, loss or theft of yellowcake or sealed sources, significant fires, and other natural disasters.

The SOPs shall include appropriate radiation safety practices to be followed in accordance with 10 CFR Part 20. SOPs for operational activities shall enumerate pertinent radiation safety practices to be followed. Current copies of the SOPs shall be kept in the area(s) of the production facility where they are utilized. These SOPs are subject to inspection, including the preoperational inspection specified in LC 12.3.

10.5 Mechanical Integrity Tests (MITs). The licensee shall construct all wells in accordance with methods described in Sections 3.1.2.2 and 3.1.2.3 of the approved license application. The licensee shall perform well MITs on each injection and production well before the wells are utilized and on wells that have been serviced with down hole drilling or reaming equipment or procedures that could damage the well casing. Additionally, the licensee shall retest each well at least once every 5 years. The licensee shall perform MITs in accordance with Section 3.1.2.4 of the licensee's approved license application. Any failed well casing that cannot be repaired to pass the MIT shall be appropriately plugged and abandoned in accordance with Section 6.1.8 of the approved license application.

10.6 Groundwater Restoration. The licensee shall conduct groundwater restoration activities in accordance with Section 6.1 of the approved license application. Permanent cessation of lixiviant injection in a production area would signify the licensee's intent to shift from the principal activity of uranium recovery to the initiation of groundwater restoration and decommissioning for any particular production area. If the licensee determines that these activities are expected to exceed 24 months for any particular production area, the licensee shall submit an alternate schedule request that meets the requirements of 10 CFR 40.42.

Restoration Standards. Hazardous constituents in the groundwater shall be restored to the numerical groundwater protection standards required by 10 CFR Part 40, Appendix A, Criterion 5B(5). In submitting any license amendment application requesting review and approval of proposed alternate concentration limits (ACLs) pursuant to Criterion 5B(6), the licensee must show that it has first made practicable effort to restore the specified hazardous constituents to the background or maximum contaminant levels (whichever is greater).

Restoration Stability Monitoring. The licensee shall conduct sampling of all constituents of concern on a quarterly basis during restoration stability monitoring. The sampling shall include the specified production zone aquifer wells. The applicant shall continue the stability monitoring until the data show that the most recent four consecutive quarters indicate no statistically significant increasing trend for all constituents of concern that would lead to an exceedance above the respective standard in 10 CFR Part 40, Appendix A, Criterion 5B(5).

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

Notwithstanding the LC 9.4 change process, the licensee shall not implement any changes to groundwater restoration or post-restoration monitoring plans without written NRC verification that the criteria in LC 9.4 do not require a license amendment. The licensee shall submit all changes to groundwater restoration or post-restoration monitoring plans to the NRC staff, for review and written verification, at least 60 days prior to commencement of groundwater restoration in a production area.

10.7 The licensee shall maintain a net inward hydraulic gradient at a wellfield as measured from the surrounding perimeter monitoring well ring starting when lixiviant is first injected into the production zone and continuing until initiation of the stabilization period.

10.8 The licensee is permitted to construct and operate storage and treatment ponds, as described in Section 4.2 of the approved license application. Routine pond inspections will be conducted consistent with inspection procedures described in Regulatory Guide 3.11.

10.9 The licensee shall establish and conduct an effluent and environmental monitoring program in accordance with those programs described in Section 5.7.8 and Section 5.7.7 of the approved license application.

Facility Specific Conditions

10.10 Hydrologic Test Packages.

A) Prior to principal activities in a new wellfield, the licensee shall submit a hydrologic test package to the NRC at least 60 days prior to the planned start date of lixiviant injection. The hydrologic test package for B-WF-1 or D-WF-1, whichever is developed first, will be submitted for review and written verification while the remaining hydrologic test packages will be submitted for NRC staff review except as described in paragraph B of this License Condition. In each hydrologic test data package, the licensee will document that all perimeter monitoring wells are screened in the appropriate horizon in order to provide timely detection of an excursion. Contents of a wellfield package shall include:

- A description of the proposed wellfield (location, extent, etc.).
- Map(s) showing the proposed production and injection well patterns and locations of all monitor wells.
- Geologic cross sections and cross section location maps.
- Isopach maps of the production zone sand and overlying and underlying confining units.
- Discussion of aquifer test procedures, including well completion reports.
- Discussion of the results and conclusions of aquifer tests, including raw data, drawdown match curves, potentiometric surface maps, water level graphs, drawdown maps and, when appropriate, directional transmissivity data and graphs.
- Sufficient information to show that wells in the monitor well ring are in adequate communication with the production patterns.
- All raw analytical data for Commission-approved background water quality.
- Summary tables of analytical data showing computed Commission-approved background water quality.
- Descriptions of statistical methods for computing Commission-approved background water quality.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

- Any other information pertinent to the proposed wellfield area tested will be included and discussed.

B) The licensee will submit, for NRC review and approval, hydrologic test packages for wellfields BWF-6, -7, and -8. No extraction will be permitted in these wellfields until the staff approves the hydrologic package. Hydrologic packages shall include all the information in paragraph A of this license condition and aquifer test results that address the partially unsaturated conditions of the Chilson Aquifer in these wellfields. These hydrologic packages will also contain a justification for well spacings in the monitoring well ring and overlying and underlying aquifers.

10.11 The licensee is prohibited from using the "glue and screw" method of joining well casings to construct any monitoring, injection, or production well.

10.12 If land application is utilized, the licensee will implement a pre operational and operational sampling plan, as discussed in Section 6.0 of the licensee's Groundwater Discharge Plan submitted to and per the conditions in its Groundwater Discharge Plan permit issued by the South Dakota Department of Environment and Natural Resources, until principal activities at the land application areas cease.

10.13 The licensee shall conduct radiological characterization of airborne samples for natural U, Th-230, Ra-226, Po-210, and Pb-210 for each restricted area air particulate sampling location at a frequency of once every 6 months for the first 2 years following issuance of the initial license, and annually thereafter to ensure compliance with 10 CFR 20.1204(g). The licensee shall also evaluate changes to plant operations to determine if more frequent radionuclide analyses are required for compliance with 10 CFR 20.1204(g).

10.14 The licensee shall ensure radiation safety training is consistent with the current versions of Regulatory Guide 8.13, "Instruction Concerning Prenatal Radiation Exposure," Regulatory Guide 8.29, "Instruction Concerning Risks from Occupational Radiation Exposure," and Section 2.5 of Regulatory Guide 8.31, or NRC-approved equivalent guidance.

SECTION 11: Monitoring, Recording, and Bookkeeping Requirements

Standard Conditions

11.1 In addition to reports required to be submitted to NRC or maintained on-site by Title 10 of the Code of Federal Regulations, the licensee shall prepare the following reports related to operations at the facility:

A) Quarterly reports that include a summary of excursion parameter concentrations, wells placed on or removed from excursion status, corrective actions taken, and the results obtained for all wells that were on excursion status during that quarter. These reports shall be submitted to NRC within 60 days following completion of the reporting period.

B) Semiannual reports that discuss the status of wellfields in operation (including last date of lixiviant injection), progress of wellfields in restoration and restoration progress, status of any long-term excursions, and a summary of MITs during the reporting period. These reports shall be submitted to NRC within 60 days following completion of the reporting period.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

C) Quarterly reports summarizing daily flow rates for each injection and production well and injection manifold pressures on the entire system. These reports shall be made available for inspection upon request.

D) Consistent with Regulatory Position 2 of Regulatory Guide 4.14, semiannual reports that summarize the results of the operational effluent and environmental monitoring program. The licensee shall submit these reports consistent with the terms of Regulatory Guide 4.14.

11.2 The licensee shall submit to the NRC the results of its annual review of its radiation protection program content and implementation performed in accordance with 10 CFR 20.1101(c). These results shall include an analysis of dose to individual members of the public consistent with 10 CFR 20.1301 and 10 CFR 20.1302.

11.3 Establishment of Commission-Approved Background Water Quality. Prior to injection of lixiviant in each production wellfield, as defined by the licensee, the licensee shall establish Commission-approved background groundwater quality data for the ore zone, overlying aquifers, underlying aquifers, alluvial aquifers (where present), and the perimeter monitoring areas. Commission-approved background sampling will be performed in accordance with Section 5.7.8 of the approved license application, and samples shall be analyzed for the parameters listed in Table 6.1-1 of the approved application. The licensee shall submit any revisions to its Commission-approved background water quality sampling plan to the NRC staff for review and approval.

11.4 Establishment of UCLs. Prior to injection of lixiviant into each production wellfield, as defined by the licensee, the licensee shall establish excursion parameters and their respective upper control limits (UCLs) in the designated overlying aquifer(s), underlying aquifer, and perimeter monitoring areas in accordance with Section 5.7.8 of the approved license application. Unless otherwise determined, the site-specific excursion parameters are chloride, conductivity, and total alkalinity. The UCLs shall be established for each excursion control parameter and for each well based on the mean plus five standard deviations of the data collected for LC 11.3. The UCL for chloride can be set at the sum of the background mean concentration and either (a) five standard deviations or (b) 15 mg/L, whichever sum provides the higher limit. The licensee shall submit any revisions to its plan for establishing UCLs to the NRC staff for review and approval.

11.5 Excursion Monitoring. Monitoring for excursions shall occur twice monthly, and no more than 14 days apart in any given month during operations, for all wells where UCLs have been established per Section 5.7.8 of the approved license application. If a designated monitor well is not sampled within 14 days of a previous sampling event, the reasons for this postponement shall be documented. Sampling shall not be postponed for more than 5 days.
If the concentrations of any two excursion indicator parameters exceed their respective UCL or any one excursion indicator parameter exceeds its UCL by 20 percent, the excursion criterion is exceeded and a verification sample shall be taken from that well within 48 hours after results of the first analyses are received. If the verification sample confirms that the excursion criterion is exceeded, the well shall be placed on excursion status. If the verification sample does not confirm that the excursion criterion is exceeded, a third sample shall be taken within 48 hours after the results of the verification sample are received. If the third sample shows that the excursion criterion is exceeded, the well shall be placed on excursion status. If the third sample does not show that the excursion criterion is exceeded, the first sample shall be considered an error and routine excursion monitoring will be resumed (the well is not placed on excursion status).

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

Upon confirmation of an excursion, the licensee shall notify NRC, as discussed below, implement corrective action, and increase the sampling frequency for the excursion indicator parameters at the well on excursion status to at least once every 7 days. Corrective actions for confirmed excursions may be, but are not limited to, those described in Section 5.7.8 of the approved license application. An excursion is considered corrected when concentrations of all indicator parameters are below the concentration levels defining the excursion for three consecutive weekly samples.

If an excursion is not corrected within 60 days of confirmation, the licensee shall either (a) terminate injection of lixiviant within the wellfield until the excursion is corrected; or (b) increase the surety in an amount to cover the full third-party cost of correcting and cleaning up the excursion. The surety increase shall remain in force until the NRC has verified that the excursion has been corrected and remediated. The written 60-day excursion report shall identify which course of action the licensee is taking. Under no circumstances does this condition eliminate the requirement that the licensee remediate the excursion to meet groundwater protection standards as required by LC 10.6 for all constituents established per LC 11.3.

The licensee shall notify the NRC Project Manager (PM) by telephone or email within 24 hours of confirming a lixiviant excursion, and by letter within 7 days from the time the excursion is confirmed, pursuant to LC 11.6 and 9.3. A written report describing the excursion event, corrective actions taken, and the corrective action results shall be submitted to the NRC within 60 days of the excursion confirmation. For all wells that remain on excursion status after 60 days, the licensee shall submit a report as discussed in LC 11.1(A).

11.6 Until license termination, the licensee shall maintain documentation on unplanned releases of source or byproduct material (including process solutions) and process chemicals. Documented information shall include, but not be limited to, the date, spill volume, total activity of each radionuclide released, radiological survey results, soil sample results (if taken), corrective actions, results of postremediation surveys (if taken), a map showing the spill location and the impacted area, and an evaluation of NRC reporting criteria.

The licensee shall have written procedures for evaluating the consequences of the spill or incident/event against 10 CFR Part 20, Subpart M, “Reports,” and 10 CFR 40.60 reporting criteria. If the criteria are met, the licensee shall report to the NRC Operations Center as required.

If the licensee must report any production area excursion or spill of source material, byproduct material, or process chemicals that may have an impact on the environment, or any other incident/event, to any State or other Federal agency, the licensee shall make a report to the NRC Headquarters Project Manager (PM) by telephone or electronic mail (e-mail) within 24 hours. In accordance with LC 9.3, this notification shall be followed, within 30 days of the notification, by submittal of a written report to NRC Headquarters detailing the conditions leading to the spill or incident/event, corrective actions taken, and results achieved.

Facility Specific Conditions

11.7 The licensee shall submit semi-annual reports that present the flow rates and volumes of liquid effluent discharged to Class V disposal wells and land application areas, influent flow rates into satellite and central processing plants, and bleed rates. The first report is due no later than 12 months after the start of operations, and shall account for all effluent discharges and inflows during the previous 12 months.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

11.8 After the initial land use update discussed in LC 12.15, every 12 months thereafter the licensee shall submit a land use update report for NRC staff review, until groundwater restoration and decommissioning are completed and approved by the NRC.

SECTION 12.0: Preoperational Conditions

Standard Conditions

12.1 Prior to commencement of operations in any production area, the licensee shall obtain all necessary permits, licenses, and approvals from the appropriate regulatory authorities. The licensee shall also submit a copy of all permits for its Class III and Class V underground injection wells to the NRC.

12.2 Prior to commencement of operations, the licensee shall coordinate emergency response requirements with local authorities, fire department, medical facilities, and other emergency services. The licensee shall document these coordination activities and maintain such documentation on-site.

12.3 The licensee shall not commence operations until the NRC performs a preoperational inspection to confirm, in part, that written operating procedures and approved radiation safety and environmental monitoring programs are in place, and that preoperational testing is complete. The licensee should notify the NRC, at least 90 days prior to the expected commencement of operations, to allow the NRC sufficient time to plan and perform the preoperational inspection.

12.4 The licensee shall identify the location, screen depth, and estimated pumping rate of any new groundwater wells or new use of an existing well within the license area and within 2 kilometers (1.25 miles) of any proposed wellfield boundary, as measured from the perimeter monitoring well ring, since the application was submitted to the NRC. The licensee shall evaluate the impact of ISR operations to potential groundwater users and recommend any additional monitoring or other measures to protect groundwater users. The evaluation shall be submitted to the NRC for review within 6 months of discovery of such well use.

12.5 Prior to commencement of operations, the licensee shall submit the qualifications of radiation safety staff members for NRC staff review and written verification.

12.6 Prior to commencement of operations, the licensee shall submit a copy of the solid byproduct material disposal agreement to the NRC.

Facility Specific Conditions

12.7 At least 60 days prior to construction, the licensee will propose in writing, for NRC review and written verification, a monitoring well network for the Fall River Aquifer in the Burdock area for those wellfields in which the Chilson Aquifer is the extraction zone.

12.8 The licensee will continue to collect additional meteorological data on a continuous basis at a data recovery rate of 90 percent until the data collected is determined by the NRC staff to be representative of long-term conditions. Justification of the similarity or validity of the data will include analysis of the statistical data presented to illustrate confidence in the representativeness of the data. The data collected shall include, at a minimum, wind speed, wind direction, and an annual wind rose. The submittal shall include a summary of the stability classification.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

12.9 The licensee shall submit preoperational surface water analytical data for the new surface water sampling locations to the NRC for review and written verification within 3 months of the initiation of operations. Surface water analytical data shall be of the same completeness (e.g. parameters, quality of analyses, and frequency) as the data provided in the licensee's June 2011 submittal (ADAMS Accession No. ML112071064).

12.10 Prior to commencement of operations, the licensee will collect four quarterly groundwater samples from each well within 2 km (1.25 mi) of the boundary of any wellfield, as measured from the perimeter monitoring well ring. This data shall be submitted to the NRC staff for review and written verification. Furthermore, all domestic, livestock, and crop irrigation wells within 2 km (1.25 mi) of the boundary of any wellfield, as measured from the perimeter monitoring well ring, will be included in the routine environmental sampling program provided that well owners consent to sampling and the condition of the wells renders them suitable for sampling.

12.11 No later than 30 days prior to construction, the licensee will provide additional statistical analysis of the soil sampling data and gamma measurements to establish sufficient statistical relationships. If such relationships are not sufficient for use at the site, additional procedures or data shall be submitted to the NRC staff for review and written verification.

12.12 No later than 30 days before the start of operations, the licensee shall provide the NRC staff, for review and written verification, its procedures for documenting the wellfield inspections. These procedures shall include the personnel tasked with performing these inspections, items to be inspected, criteria for determining upset conditions, and the manner in which the inspections will be documented.

12.13 No later than 30 days prior to the preoperational inspection, the licensee shall provide to the NRC staff, for review and written verification, its procedures for preparing logs of the dryer and emissions control system performance in accordance with 10 CFR Part 40, Appendix A, Criterion 8. The procedure shall include the manner in which logs for inspection will be produced and maintained at the Dewey-Burdock Project. These procedures shall also specify specific job functions or categories of personnel responsible for responding to malfunctions of the dryer and emissions control system and the manner in which such responsible persons are notified of malfunctions.

12.14 No later than 90 days before the start of operations, the licensee shall provide, for the NRC Staff review and written verification, the qualifications and training required for RSO designees for reviewing and issuing radiation work permits.

12.15 No later than 30 days before the start of operations, the licensee shall submit a report for NRC staff review updating land use descriptions within the Dewey-Burdock Project and within 2 miles of the license boundary. This report shall identify actual land use changes, new structures and the purpose, and new water supply wells and the purpose.

12.16 At least 30 days prior to the preoperational inspection, the licensee shall provide a list of its instrumentation to be used during operations, including the manufacturer, model number or a description, and the range of sensitivity of the radiation survey meters for measuring beta radiation. The licensee shall also provide a plan for conducting beta surveys in process areas.

12.17 No later than 30 days before the preoperational inspection, the licensee shall submit to the NRC staff, for review and written verification, an acceptable method to ensure the soluble intake of uranium will be ALARA.

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

12.18 The licensee shall submit to the NRC staff for review and written verification the procedures by which it will ensure that unmonitored employees will not exceed 10 percent of the dose limits in 10 CFR Part 20, Subpart C.

12.19 The licensee shall prepare a bioassay QA/QC procedure that is consistent with Regulatory Guide 8.22. This procedure shall be made available for NRC staff review and written verification during the preoperational inspection.

12.20 No later than 30 days before the preoperational inspection, the licensee shall develop a survey program for beta-gamma contamination for personnel exiting from restricted areas that complies with the requirements of 10 CFR Part 20, Subpart F.

12.21 The licensee shall provide, for NRC staff review and written verification, the surface contamination detection capability (scan MDC) for radiation survey meters used for contamination surveys to release equipment and materials for unrestricted use and for personnel contamination surveys. The detection capability in the scanning mode for the alpha and beta-gamma radiation expected shall be provided in terms of dpm per 100 cm^2.

12.22 No later than 30 days before the preoperational inspection, the licensee shall provide to the NRC staff, for review and written verification, written procedures for its airborne effluent and environmental monitoring program that:

A. Discuss how, in accordance with 10 CFR 40.65, the quantity of the principal radionuclides from all point and diffuse sources will be accounted for in, and verified by, surveys and/or monitoring.

B. Evaluate the member(s) of the public likely to receive the highest exposures from licensed operations consistent with 10 CFR 20.1302.

C. Discuss and identify how radon (radon-222) progeny will be factored into analyzing potential public dose from operations consistent with 10 CFR Part 20, Appendix B, Table 2.

D. Discuss how, in accordance with 10 CFR 20.1501, the occupational dose (gaseous and particulate) received throughout the entire License Area from licensed operations will be accounted for, and verified by, surveys and/or monitoring.

12.23 [Deleted by Amendment 1]

12.24 At least 60 days prior to the preoperational inspection, the licensee will submit a completed Quality Assurance Project Plan (QAPP) to the NRC for review to verify that the QAPP will be consistent with Regulatory Guide 4.15 (as revised).

12.25 No later than 60 days prior to construction, the licensee shall submit to the NRC for review and written verification, a pond detection monitoring plan that contains the number, locations, and screen depths of groundwater monitoring wells to installed around the Burdock area and Dewey area ponds.

NRC FORM 374A U.S. NUCLEAR REGULATORY COMMISSION

MATERIALS LICENSE SUPPLEMENTARY SHEET	License Number SUA-1600
	Docket or Reference Number 040-09075
	Amendment No. 3

The plan shall also include sampling frequency and sampling parameters. Monitoring wells installed to comply with the licensee's Groundwater Discharge Permit issued by the State of South Dakota may be incorporated into this monitoring network.

FOR THE NUCLEAR REGULATORY COMMISSION

Date: October 7, 2020

Bill Von Till, Branch Chief
Uranium Recovery and Materials
Decommissioning Branch
Division of Decommissioning, Uranium Recovery,
and Waste Programs
Office of Nuclear Material Safety
and Safeguards

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
Jeff Baran

In the Matter of POWERTECH (USA), INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-16-20

MEMORANDUM AND ORDER

This decision addresses four petitions for review relating to a materials license application for an *in situ* uranium recovery facility filed by Powertech (USA), Inc.[1] All parties to the proceeding—the Oglala Sioux Tribe, Consolidated Intervenors, Powertech, and the NRC Staff—have filed petitions for review of the Atomic Safety and Licensing Board's Partial Initial Decision and in the case of the Oglala Sioux Tribe and Consolidated Intervenors, earlier Board decisions finding several of their proffered contentions inadmissible.[2]

[1] Powertech (USA) Inc.'s Submission of an Application for a Nuclear Regulatory Commission Uranium Recovery License for Its Proposed Dewey-Burdock In Situ Leach Uranium Recovery Facility in the State of South Dakota (Feb. 25, 2009) (ADAMS accession no. ML091030707).

[2] LBP-15-16, 81 NRC 618 (2015); *see Oglala Sioux Tribe's Petition for Review of LBP-15-16 and Decisions Finding Tribal Contentions Inadmissible* (May 26, 2015) (Tribe's Petition); *Consolidated Intervenors' Petition for Review of LBP-15-16* (May 26, 2015) (Consolidated Intervenors' Petition); *Brief of Powertech (USA), Inc. Petition for Review of LBP-15-16* (May 26,

As discussed below, we take review of these petitions in part. We grant each party's petition with respect to the finality of the Board's ruling on Contentions 1A and 1B, find that these contentions should be considered "final" for the purposes of the petitions for review at issue here, and, pursuant to our inherent supervisory authority over agency adjudications, direct that the proceeding remain open for the narrow issue of resolving the deficiencies identified in Contentions 1A and 1B. We deny the remainder of Consolidated Intervenors' petition for review. With respect to Powertech's and the Staff's petitions for review, we also take review of the Board's direction to the Staff to address the deficiencies identified in Contentions 1A and 1B and we affirm the Board's direction to the Staff to submit monthly status reports and to file an agreement between the parties or a motion for summary disposition to resolve the deficiencies identified by the Board. We deny the remainder of Powertech's and the Staff's petitions for review. With respect to the Tribe's petition for review, we take review of the Board's rejection of Contention 8 as inadmissible. We find that the Board erred in its reasoning for dismissing Contention 8, but we affirm the Board's decision. We deny the remainder of the Tribe's petition for review.

I. BACKGROUND

In situ uranium recovery involves injecting a solution, called lixiviant, into an ore body through an injection well. As it flows through the ore body, the lixiviant dissolves the underground uranium. A separate production well extracts the uranium-containing solution from the ground. The uranium is then extracted from the solution though a process called ion

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2015) (Powertech's Petition); *NRC Staff's Petition for Review of LBP-15-16* (May 26, 2015) (Staff's Petition).

The Board has referred to Susan Henderson, Dayton Hyde, and Aligning for Responsible Mining as Consolidated Intervenors, although it originally called them Consolidated Petitioners. *See* LBP-14-5, 79 NRC 377, 379 n.3 (2014); LBP-13-9, 78 NRC 37, 42 n.2 (2013).

exchange. After extraction, the lixiviant is recycled and reinjected into the ore body to dissolve more uranium.[3] The *in situ* uranium recovery process is used widely throughout Wyoming, South Dakota, Nebraska, and New Mexico to recover subterranean uranium for enrichment and later use in nuclear power plants.

In order to comply with its National Environmental Policy Act (NEPA) obligations and recognizing the widespread use of this technology in this region of the country, the Staff prepared a generic environmental impact statement (GEIS) to address certain aspects of the environmental analysis for these facilities that tend to be similar across sites.[4] The GEIS also identifies resource areas that require site-specific information to fully analyze the environmental impacts. It also notes that subsequent site-specific environmental review documents may summarize and incorporate by reference information from the GEIS.[5] Any subsequent site-specific environmental impact analysis must also include new and significant information necessary to evaluate the *in situ* recovery license application.[6]

This proceeding began in February 2009, when Powertech filed an application for an *in situ* uranium recovery facility in Custer and Fall River Counties, South Dakota. In response, the Oglala Sioux Tribe and Consolidated Intervenors challenged the license application.[7] The

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[3] Ex. APP-021-A, "Powertech (USA), Inc., Dewey-Burdock Project Application for NRC Uranium Recovery License Fall River and Custer Counties, South Dakota Technical Report," (Feb. 2009), at 1-6 (ML14247A342).

[4] Exs. NRC-010-A-1 to NRC-010-B-2, "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (Final Report), NUREG-1910, vols. 1-2 (May 2009) (ML14246A328, ML14247A345, ML14246A333, ML14246A332, ML14246A351) (GEIS).

[5] Ex. NRC-010-A-1, GEIS, at xxxvii.

[6] *Id.*

[7] *Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe* (Apr. 6, 2010) (Tribe's Petition to Intervene); *Consolidated Request for Hearing and Petition for Leave to Intervene* (Mar. 8, 2010) (Consolidated Intervenors' Petition to Intervene).

Board granted their hearing requests in August 2010.[8] On November 26, 2012, the Staff issued the Draft Supplemental Environmental Impact Statement (DSEIS) for public comment.[9] The NRC Staff issued a Safety Evaluation Report (SER) in March 2013.[10] On January 29, 2014, the Staff issued the FSEIS.[11] The Staff issued the license to Powertech on April 8, 2014.[12] The

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[8] LBP-10-16, 72 NRC 361, 443-44 (2010).

[9] Exs. NRC-009-A-1 to NRC-009-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Draft Report for Comment), NUREG-1910, Supplement 4, vols. 1-2 (Nov. 2012) (ML14247A350, ML14246A329, ML14246A330, ML14246A331) (DSEIS).

Both the Tribe and individual members of Consolidated Intervenors (Susan Henderson and Dayton Hyde) commented on the DSEIS and later filed proposed contentions relating to the DSEIS. Exs. NRC-008-A-1 to NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014), app. E, at E-5 to E-6 (ML14246A350, ML14246A326, ML14246A327, ML14247A334) (FSEIS); *see Consolidated Intervenors' New Contentions Based on DSEIS* (Jan. 25, 2013) (Consolidated Intervenors' DSEIS Contentions); *List of Contentions of the Oglala Sioux Tribe Based on the Draft Supplemental Environmental Impact Statement* (Jan. 25, 2013) (Tribe's DSEIS Contentions). On July 22, 2013, the Board admitted three of the new contentions and migrated seven of the originally admitted contentions. LBP-13-9, 78 NRC at 113-15.

[10] Ex. NRC-135, "Safety Evaluation Report for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota" (Mar. 2013) (ML13052A182). The Staff issued a revised SER in April 2014 to correct certain technical references. Ex. NRC-134, "Safety Evaluation Report (Revised) for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota" (Apr. 2014) (ML14245A347).

[11] Exs. NRC-008-A-1 to NRC-008-B-2, FSEIS. On March 17, 2014, the Tribe and Consolidated Intervenors filed additional contentions related to the FSEIS. *Consolidated Intervenors' Statement of Contentions* (Mar. 17, 2014) (Consolidated Intervenors' FSEIS Contentions); *Statement of Contentions of the Oglala Sioux Tribe Following Issuance of Final Supplemental Environmental Impact Statement* (Mar. 17, 2014) (Tribe's FSEIS Contentions). The Board ruled that the contentions previously admitted in reference to the DSEIS migrated to the FSEIS and held inadmissible the remaining proposed contentions. LBP-14-5, 79 NRC at 401.

[12] Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408) (License).

Board held an evidentiary hearing on all nine admitted contentions in August 2014. In November 2014, the Tribe moved to file two new environmental contentions.[13]

The Board decision, LBP-15-16, resolved seven contentions in favor of Powertech and the Staff but found deficiencies in the Staff's NEPA analysis and NHPA consultation.[14] The Board upheld the license with an additional license condition, ruled inadmissible the two post-hearing contentions proffered by the Tribe, and directed the Staff to submit monthly reports regarding its progress in resolving the identified deficiencies.[15]

Our decision today involves four petitions for review that were filed by the parties to this proceeding. We summarize each petition below, along with the relevant procedural history for each set of issues. A full procedural history can be found in the Board's various decisions on this matter.[16]

A. The Oglala Sioux Tribe's and Consolidated Intervenors' Petitions for Review

The Oglala Sioux Tribe appeals the Board's resolution of several of its admitted contentions in favor of Powertech and the Staff.[17] The Tribe also seeks review of the Board's ruling on two of its admitted contentions that left the license in place and required the Staff to conduct additional consultation.[18] Consolidated Intervenors petition for review of the Board's decision resolving their admitted contentions in favor of Powertech and the Staff.[19] They further

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[13] *Motion for Leave to File New or Amended Contention on Behalf of the Oglala Sioux Tribe* (Nov. 7, 2014) (Tribe's Motion for New Contentions).

[14] LBP-15-16, 81 NRC at 657-58, 708-10.

[15] *Id.* at 708-10.

[16] *See id.* at 626-35; *see also* LBP-14-5, 79 NRC at 379-81; LBP-13-9, 78 NRC at 43-45; LBP-10-16, 72 NRC at 376-78.

[17] Tribe's Petition at 19-25.

[18] *Id.* at 18-19.

[19] Consolidated Intervenors' Petition at 2 & n.3, 4-7.

challenge the Board's ruling that left the license in place despite ruling in Consolidated Intervenors' favor on two of their admitted contentions.[20]

In Contentions 1A and 1B, the Tribe and Consolidated Intervenors challenged the NEPA analysis of cultural resources in the FSEIS and the Staff's compliance with the National Historic Preservation Act (NHPA).[21] The Board concluded that the Staff had fulfilled its NHPA obligations with respect to identification of historic properties. It nonetheless held that the Staff's analysis in the FSEIS did not satisfy NEPA's hard look requirement regarding cultural resources and that the Staff's consultation with the Tribe had been insufficient to comply with the Staff's additional obligations under the NHPA.[22] The Board retained jurisdiction over these contentions and required the Staff to "promptly initiat[e] a government-to-government consultation with the Oglala Sioux Tribe" to address the deficiencies identified in the Board's decision.[23] The Tribe and Consolidated Intervenors seek review of the Board's decision to leave the license in place pending resolution of Contentions 1A and 1B.[24]

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[20] *Id.* at 3, 6-7.

Consolidated Intervenors have requested that we set a briefing schedule for any issues that we accept for review. *Id.* at 8-9. In accordance with 10 C.F.R. § 2.341(c)(2), we have decided these matters on the basis of the petitions for review, and therefore deny Consolidated Intervenors' request to establish a briefing schedule.

Consolidated Intervenors also challenge the Board's ruling in LBP-10-16 that "certain petitioners" lacked standing to intervene. *Id.* at 2. In their petition, Consolidated Intervenors do not identify which petitioners they are referencing. We therefore deny review of that portion of their petition.

[21] *Oglala Sioux Tribe's Post-Hearing Initial Brief with Findings of Fact and Conclusions of Law* (Jan. 9, 2015), at 12, 27 (Tribe's Post-Hearing Brief); *Consolidated Intervenors' Proposed Findings of Fact and Conclusions of Law and Response to Post-Hearing Order* (Jan. 9, 2015), at 1-2, 14 (Consolidated Intervenors' Post-Hearing Brief).

[22] LBP-15-16, 81 NRC at 653-57.

[23] *Id.* at 657-58, 708, 710.

[24] Tribe's Petition at 18-19; Consolidated Intervenors' Petition at 6-7.

In Contention 2, the Tribe and Consolidated Intervenors argued that the FSEIS did not contain sufficient background groundwater characterization.[25] The Board resolved this contention in favor of Powertech and the Staff, and the Tribe seeks review of the Board's decision.[26]

In Contention 3, the Tribe and Consolidated Intervenors argued that the FSEIS insufficiently analyzed certain geological and manmade features that may permit groundwater migration.[27] The Board resolved this contention in favor of Powertech and the Staff but added a license condition regarding the proper treatment of unplugged boreholes.[28] Both the Tribe and Consolidated Intervenors seek review of the Board's decision.[29]

In Contention 6, the Tribe and Consolidated Intervenors challenged the FSEIS's analysis of mitigation measures and argued that it impermissibly deferred the development of additional mitigation measures.[30] The Board resolved this contention in favor of Powertech and the Staff, and the Tribe seeks review of the Board's decision.[31]

Additionally, the Tribe challenges the Board's decision in LBP-15-16 to reject as inadmissible new contentions submitted after the hearing regarding borehole data and an Environmental Protection Agency (EPA) Preliminary Assessment regarding potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

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[25] Tribe's Post-Hearing Brief at 38; Consolidated Intervenors' Post-Hearing Brief at 21.

[26] LBP-15-16, 81 NRC at 666, 708-09; *see* Tribe's Petition at 19-21.

[27] Tribe's Post-Hearing Brief at 43; Consolidated Intervenors' Post-Hearing Brief at 28, 47.

[28] LBP-15-16, 81 NRC at 681, 709.

[29] Tribe's Petition at 22-23; Consolidated Intervenors' Petition at 2 n.3, 4-7.

[30] Tribe's Post-Hearing Brief at 61-62; Consolidated Intervenors' Post-Hearing Brief at 53-56.

[31] LBP-15-16, 81 NRC at 697, 709; Tribe's Petition for Review at 23-25.

cleanup.[32] Further, it seeks review of earlier Board decisions that found two of its contentions (Contentions 7 and 8) inadmissible.[33] In proposed Contention 7, the Tribe argued that the application was deficient because it did not include a reviewable plan for disposal of byproduct material or discuss the environmental effects of such disposal.[34] The Tribe resubmitted this contention on both the DSEIS and the FSEIS, and the Board dismissed it as inadmissible each time.[35] In proposed Contention 8, the Tribe argued that the DSEIS had been issued without the requisite scoping process.[36] The Board held this contention inadmissible, finding that it did not articulate a material dispute, as required by the contention admissibility standards.[37]

Finally, Consolidated Intervenors challenge the Board's decision at the outset of the proceeding finding one of their contentions inadmissible.[38] In proposed Contention D, Consolidated Intervenors argued that Powertech's application was so disorganized that it violated 10 C.F.R. § 40.9, and the Board rejected this portion of the contention as inadmissible.[39]

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[32] Tribe's Petition at 8-11; *see* LBP-15-16, 81 NRC at 704-06, 709.

[33] Tribe's Petition at 3-8.

[34] Tribe's Petition to Intervene at 31-34.

[35] Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30, *see* LBP-14-5, 79 NRC at 396-97; LBP-13-9, 78 NRC at 71-72.

[36] Tribe's DSEIS Contentions at 30-33.

[37] LBP-13-9, 78 NRC at 74-75.

[38] Consolidated Intervenors' Petition at 2 n.3, 3-4, 7.

[39] Consolidated Intervenors' Petition to Intervene at 36; *see* LBP-10-16, 72 NRC at 402.

B. Powertech's and the NRC Staff's Petitions for Review

On appeal, the Staff and Powertech challenge the Board's resolution of Contentions 1A and 1B in favor of the Tribe and Consolidated Intervenors.[40] Additionally, both parties seek review of the Board's retention of jurisdiction over these contentions.[41] Finally, Powertech challenges the Board's imposition of an additional license condition in resolving Contention 3 that requires Powertech to locate and properly abandon unplugged boreholes within each wellfield prior to operations.[42]

II. DISCUSSION

A. Standard of Review

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to whether

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) A substantial and important question of law, policy, or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
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> (v) Any other consideration that we may deem to be in the public interest.[43]

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[40] Powertech's Petition at 6-22; Staff's Petition at 17, 23. The Tribe filed a response to both petitions on June 22, 2015. *Oglala Sioux Tribe's Consolidated Response to Petitions for Review of LBP-15-16* (June 22, 2015) (Tribe's Response).

[41] Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16, 16 n.73.

[42] Powertech's Petition at 22-25; *see* LBP-15-16, 81 NRC at 709.

[43] 10 C.F.R. § 2.341(b)(4).

We review questions of law *de novo,* but we defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[44] The standard for showing "clear error" is a difficult one to meet: petitioners must demonstrate that the Board's determination is "not even plausible" in light of the record as a whole.[45] For this reason, where a petition for review relies primarily on claims that the Board erred in weighing the evidence in a merits decision, we seldom grant review.[46] In addition, we give substantial deference to the Board on issues of contention admissibility and will affirm admissibility determinations absent a showing of an error of law or abuse of discretion.[47] In *Pa`ina Hawaii, LLC* (Materials License Application) we said the following about our standard of review:

> We refrain from exercising our authority to make *de novo* findings of fact in situations where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact. As we have stated many times, while we have discretion to review all underlying factual issues *de novo*, we are disinclined to do so where a Board has weighed arguments presented by experts and rendered reasonable, record-based factual findings. Our standard of "clear error" for overturning a Board's factual findings is quite high. We defer to a board's factual findings, correcting only clearly erroneous findings—that is, findings not even plausible in light of the record viewed in its entirety—where we have strong

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[44] *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013); *David Geisen*, CLI-10-23, 72 NRC 210, 224-25, 242 (2010).

[45] *Honeywell,* CLI-13-1, 77 NRC at 18 n.102; *Geisen,* CLI-10-23, 72 NRC at 224-25.

[46] *See, e.g.*, *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 162-63 (2014); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 46 (2012) (stating "where a Board's decision rests on a weighing of extensive fact-specific evidence presented by technical experts, we generally will defer"); *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 30 (2010) (noting that the Commission is "generally disinclined to upset *fact*-driven Licensing Board determinations") (internal quotations omitted).

[47] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 354-55 (2015); *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 35 (2009).

reason to believe that a board has overlooked or misunderstood important evidence.[48]

B. Contentions Rejected Prior to Hearing

The Tribe and Consolidated Intervenors seek review of three Board decisions that found several of their proposed contentions inadmissible.

1. The Tribe's Proposed Contention 7

In proposed Contention 7, the Tribe challenged the lack of a reviewable plan for disposal of byproduct material as defined in Section 11e.(2) of the Atomic Energy Act of 1954, as amended (byproduct material).[49] The Tribe submitted this contention three times: with respect to the environmental report, the DSEIS, and the FSEIS.[50] In each case, the Tribe provided a different basis for the contention, and the Board dismissed each iteration as inadmissible.[51] In its petition for review, the Tribe argues that the Board "erred at law and abused its discretion" each time it found Contention 7 inadmissible.[52] We do not find that the Tribe raises a substantial question regarding the admissibility of this contention. With respect to each Board decision, the Tribe provides a separate basis to support its petition.

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[48] *Pa`ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 72-73 (2010) (internal quotations and citations omitted).

[49] Tribe's Petition to Intervene at 31-34. Section 11e.(2) of the Atomic Energy Act of 1954, as amended, defines "byproduct material" as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2).

[50] Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30; Tribe's Petition to Intervene at 31-34.

[51] *See* Tribe's FSEIS Contentions at 33-39; Tribe's DSEIS Contentions at 27-30; Tribe's Petition to Intervene at 31-34; *see also* LBP-14-5, 79 NRC at 397; LBP-13-9, 78 NRC at 71-72; LBP-10-16, 72 NRC at 434-35.

[52] Tribe's Petition at 3.

a. Proposed Contention and Board Orders LBP-10-16, LBP-13-9, and LBP-14-5

The Board rejected Contention 7 in LBP-10-16, finding that the Tribe did not show that Powertech had failed to comply with any NRC or other federal regulation.[53] The Tribe argued that 10 C.F.R. § 40.31(h) and Criterion 1 in Appendix A to 10 C.F.R. Part 40 require Powertech to provide a specific plan for disposal of byproduct material in its application. The Board rejected this argument and explained that—per our case law—these provisions apply to uranium mills, not *in situ* recovery sites.[54] Additionally, the Tribe argued that NEPA required that the application contain a specific disposal plan. The Board disagreed, holding that the Staff, not the applicant, is bound by NEPA.[55] But the Board noted that the Tribe would have the opportunity, if it were not satisfied with the treatment of this issue in the Staff's environmental documents, to renew this contention after issuance of those documents.[56]

The Tribe did just that when it filed a similar contention with respect to the analysis in the DSEIS, which the Board ruled inadmissible in LBP-13-9.[57] The Board determined that the Staff had addressed impacts related to byproduct material in both the DSEIS and the GEIS.[58] The Board observed that, insofar as the Tribe claimed that the contention was one of "omission," the

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[53] LBP-10-16, 72 NRC at 434. The Tribe called this Contention 7 in its initial petition and its DSEIS Contentions. It refers to the same contention as FSEIS Contention 2 in its FSEIS Contentions. To minimize confusion, we will refer to this contention as Contention 7 throughout this decision.

[54] *Id.* (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 8 (1999) ("We agree with the Presiding Officer's general conclusion that section 40.31(h) and Part 40, Appendix A, 'were designed to address the problems related to mill tailings and not problems related to [*in situ*] mining.'")).

[55] *Id.* at 435.

[56] *Id.*

[57] Tribe's DSEIS Contentions at 27-30; *see* LBP-13-9, 78 NRC at 71-72.

[58] LBP-13-9, 78 NRC at 71.

contention was moot because the DSEIS contained the information the Tribe claimed was missing.[59] The Board stated that

> because the Oglala Sioux Tribe neither substantively disputes the analysis of impacts related to disposal of byproduct material in relevant sections of the DSEIS and the GEIS, nor addresses the license condition related to disposal of byproduct material, the Board rejects this contention as failing to comply with the admissibility dictates of 10 C.F.R. § 2.309(f)(1)(vi).[60]

Upon issuance of the FSEIS, the Tribe refiled an identical contention alleging inadequate analysis of direct, indirect, and cumulative impacts of disposal of byproduct material.[61] The Board found the contention inadmissible and explained that the section of the FSEIS the Tribe cited did not differ materially from the parallel section in the DSEIS. Accordingly, the Board held that the Tribe failed to meet the requirements of 10 C.F.R. § 2.309(c)(1)(ii) for the filing of a new contention.[62]

b. The Tribe's Petition for Review

On appeal, the Tribe challenges the Board's ruling, supported by both the plain language of the regulation and our precedent, that 10 C.F.R. § 40.31(h) and Part 40 Appendix A, Criterion 1, are inapplicable to *in situ* recovery facilities. We disagree—this point is well settled and we see no reason to revisit it here.[63]

Further, the Tribe argues that Part 40 Appendix A, Criterion 2, which is applicable to *in situ* uranium recovery facilities, requires a plan for waste disposal in the application. Based on

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[59] *Id.*

[60] *Id.* at 71-72.

[61] Tribe's FSEIS Contentions at 33-39.

[62] LBP-14-5, 79 NRC at 397. Additionally, the Board noted that Powertech's draft license contained license conditions requiring that "Powertech [have a] byproduct material disposal contract in place prior to the commencement of operations." *Id.*

[63] *Hydro Resources, Inc.*, CLI-99-22, 50 NRC at 8.

the plain language of Criterion 2, we disagree. Criterion 2 states that "byproduct material from [*in situ*] extraction operations … must be disposed of at existing large mill tailings disposal sites …."[64] This provision mandates that disposal of byproduct material take place at an existing disposal site—it does not require that the application include a waste disposal plan or designate which waste disposal site will be used.

Next, the Tribe argues that the Standard Review Plan "specifically discusses the need for a … waste disposal plan."[65] But the Tribe's argument regarding the Standard Review Plan does not demonstrate Board error. The Standard Review Plan is not a regulation; it is guidance for the Staff in reviewing an application, and it provides one way to comply with our regulations.[66] Additionally, as the Board explained in LBP-10-16, the Staff's standard practice allows applicants *either* to identify a waste disposal site in their applications *or* to implement a license condition regarding waste disposal.[67] As discussed below, Powertech's license includes two conditions related to waste disposal.[68] The Tribe has not identified any regulation to the contrary.

Additionally, the Tribe takes issue with the Board's statement that an applicant is not bound by NEPA.[69] The Board had stated that although "[t]he Tribe also argue[d] that a specific disposal plan must be included in Powertech's Application in order to comply with NEPA. … It is

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[64] 10 C.F.R. pt. 40, app. A, Criterion 2.

[65] Tribe's Petition at 4.

[66] *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 23 n.70 (2014) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995)).

[67] LBP-10-16, 72 NRC at 435.

[68] *See* Ex. NRC-012, License, at 6, 12.

[69] Tribe's Petition at 4.

settled law that an applicant is not bound by NEPA, but by NRC regulations in Part 51."[70] Insofar as it could be interpreted as implying that the Tribe was premature in filing its environmental contentions on the application, the Board's decision was incorrect. Although it is true that "the ultimate burden with respect to NEPA lies with the NRC Staff," our regulations require that intervenors file environmental contentions on the applicant's environmental report.[71] In any case, any Board error here was harmless because it also stated that the Tribe would have the opportunity to formulate a contention regarding disposal of byproduct material on the DSEIS, and indeed, the Tribe did so.[72]

The Tribe asserts that the Board's recognition that planning for waste disposal is an important aspect of our regulations necessarily raises a substantial question for our review.[73] In support of this argument, the Tribe refers to concerns the Board expressed regarding whether waste disposal would be addressed in Powertech's license.[74] In LBP-10-16, the Board noted that "if a condition dealing with … byproduct material is not included in the license, the Tribe has no recourse because it cannot challenge the license at that time."[75] However, Powertech's

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[70] LBP-10-16, 72 NRC at 435.

[71] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 (2010); *see* 10 C.F.R. § 2.309(f)(2).

[72] LBP-10-16, 72 NRC at 435. *See* Tribe's DSEIS Contentions at 27-30; *see also Geisen*, CLI-10-23, 72 NRC at 245 ("[T]o prevail on appeal, [a party] must show not only that the majority erred but also that the error had a prejudicial effect on the [party's] case." (citations omitted)).

[73] The Tribe argues that "[a]lthough the [Board] excluded Contention 7, the Board recommended 'that this issue be considered by the Commission (or Board) when it conducts the mandatory review and hearing that must be held in this case.'" Tribe's Petition at 4 (quoting LBP-10-16, 72 NRC at 435). The Board cited 10 C.F.R. § 51.107(a), which refers to issuance of a combined license for a nuclear power reactor; it has no applicability to *in situ* leach facilities. Mandatory hearings are not held in materials licensing proceedings like this one.

[74] Tribe's Petition at 4.

[75] LBP-10-16, 72 NRC at 435.

license contains multiple conditions regarding disposal of byproduct material. License Condition 12.6 requires Powertech to submit to the NRC a disposal agreement with a licensed disposal site before beginning operations.[76] License Condition 9.9 requires Powertech to maintain such a disposal agreement; if the agreement expires or otherwise terminates, Powertech must halt operations.[77]

Although the Board held that Contention 7 was rendered moot by the analysis of the impacts of the disposal of byproduct material in the DSEIS, the Tribe argues that the DSEIS only identified a possible site for the disposal of byproduct material; the Tribe reiterates its argument that the DSEIS's analysis of the impacts of byproduct material disposal was lacking.[78] On appeal, the Tribe argues that the Board erred in rejecting Contention 7 as a contention of omission.[79] But, as explained above, the Board found that the DSEIS and the GEIS analyzed the impacts of the disposal of byproduct material, and it pointed to specific sections of both documents.[80] The Board's ruling did not rest on the distinction between a contention of omission and one of inaccuracy—it found that the Tribe's proposed contention failed to challenge or address the information in the DSEIS and the draft license condition related to waste disposal.[81] On appeal, the Tribe argues that the discussion of waste disposal in the GEIS was insufficient to fulfill the Staff's responsibilities, but the Tribe fails to consider that, as the

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[76] Ex. NRC-012, License, at 12.

[77] *Id.* at 6.

[78] Tribe's Petition at 5; *see* LBP-13-9, 78 NRC at 71.

[79] Tribe's Petition at 5. As the Board noted, the Tribe itself characterized this contention as one of omission. *See* Tribe's DSEIS Contentions at 28; *see also* LBP-13-9, 78 NRC at 71.

[80] LBP-13-9, 78 NRC at 71.

[81] *Id.* at 71-72.

Board noted, both the DSEIS and the draft license condition also addressed waste disposal.[82] The Tribe does not identify any error regarding the Board's ruling on this point; therefore it does not raise a substantial question for our review.

Next, the Tribe argues that the Board dismissed Contention 7 as inadmissible "simply because the draft license contained a provision requiring the applicant to establish a disposal plan at some point in the future."[83] But the Tribe misstates the Board's basis for its ruling. The Board based its ruling on the Staff's analysis in the GEIS, the DSEIS, and expectation that the license would include conditions regarding waste disposal.[84] Given the Board's reliance on the Staff's analysis and the expected license conditions—which, are indeed present in Powertech's license—we see no substantial question for review here.

The Tribe's final argument in its petition for review with respect to Contention 7 invokes the United States Court of Appeals for the District of Columbia Circuit's decision vacating the waste confidence rule, now called the continued storage rule (10 C.F.R. § 51.23).[85] The Tribe argues that the court's vacatur of the former waste confidence rule confirms that the Tribe has raised a substantial question regarding the Board's dismissal of its proposed Contention 7 in LBP-14-5 and is analogous to this proceeding.[86]

But the court's decision regarding continued storage has no bearing on this issue. Neither the waste confidence rule nor the continued storage rule applies to 11e.(2) byproduct

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[82] Tribe's Petition at 5; *see* LBP-13-9, 78 NRC at 71-72.

[83] Tribe's Petition at 5.

[84] LBP-13-9, 78 NRC at 71-72.

[85] Tribe's Petition at 5-6; *see New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[86] In a decision issued on June 3, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied the petitions for review challenging the NRC's updated continued storage rule. *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016), *reh'g denied* 2016 U.S. App. LEXIS 14584 (D.C. Cir. Aug. 8, 2016).

material. These rules only apply to environmental impacts of spent fuel storage at power reactors and spent fuel storage facilities after the end of a reactor's license term and before disposal in a deep geologic repository.[87] Moreover, License Condition 12.6 expressly prevents Powertech from beginning operations—and therefore producing byproduct material—before it has in place an agreement with a licensed waste disposal site. And License Condition 9.9 prevents Powertech from continuing to operate if the waste disposal agreement expires or is otherwise terminated. In sum, the continued storage rule is inapplicable to Powertech's facility and Powertech's license is conditioned to ensure that it will not produce byproduct material without a plan for disposal. Accordingly, the Tribe does not raise a substantial question for review.

2. The Tribe's Proposed Contention 8

The Tribe petitions for review of the Board's rejection of its proposed Contention 8, in which it argued that the DSEIS had been issued without the requisite scoping process.[88] The Board rejected the contention for failing to demonstrate that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact."[89] The Board held that 10 C.F.R. §§ 51.26(d) and 51.92(d) both exempt the Staff from conducting a scoping process for a

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[87] *See* 10 C.F.R. § 51.23.

[88] Tribe's Petition at 7; *see* Tribe's DSEIS Contentions at 30-33; LBP-13-9, 78 NRC at 74-75. In Contention 8, which the Tribe submitted on both the application and the DSEIS, the Tribe also challenged the requirement to submit environmental contentions before the Staff's completion of its NEPA analysis. The Board rejected—in both LBP-10-16 and LBP-13-9—the Tribe's argument that this requirement violates NEPA. LBP-13-9, 78 NRC at 74; LBP-10-16, 72 NRC at 437-38. The Board explained that the challenge "could be properly characterized as 'an impermissible attack on NRC regulations, in contravention of 10 C.F.R § 2.335.'" LBP-13-9, 78 NRC at 74 (quoting LBP-10-16, 72 NRC at 436). The Tribe has not challenged the Board's reasoning on this portion of Contention 8.

[89] LBP-13-9, 78 NRC at 74-75 (quoting 10 C.F.R. § 2.309(f)(1)(vi)).

"supplemental" EIS based on a plain language reading of the regulation.[90] Further, the Board found that the Staff had engaged in a scoping process when it developed the GEIS and had conducted additional outreach during development of the SEIS, thereby satisfying the scoping requirement.[91] Therefore, the Board concluded that the Tribe's contention was inadmissible.[92]

In its petition for review, the Tribe argues that the exceptions to the scoping requirements in 10 C.F.R. §§ 51.26(d) and 51.92(d) do not apply to site-specific EISs that tier off of a GEIS merely because the Staff may describe them as supplements.[93] In support of this argument, the Tribe refers to an Office of Inspector General (OIG) Audit Report from August 2013.[94] With respect to scoping, the Audit Report concluded that

> NRC did not fully comply with the scoping regulations because of incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS. Specifically, NRC staff refer to the tiered site-specific EIS as a "supplement" to the generic EIS, leading to the belief that the exception in 10 [C.F.R.] § 51.26(d) applies to tiered EISs. Some NRC managers assert that the public scoping process for the generic EIS for [*in situ*] uranium recovery suffices for subsequent, site-specific uranium recovery applications.
>
> However, during that generic EIS scoping process in 2007, NRC staff emphasized in response to public comments that all applications would receive a site-specific review. Staff also emphasized that there would be a request for public input on scoping through a "scoping meeting" on site-specific issues if an EIS were prepared for a future application.[95]

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[90] *Id.* at 75.

[91] *Id.*

[92] *Id.*

[93] Tribe's Petition at 7.

[94] "Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements," OIG-13-A-20 (Aug. 20, 2013) (ML13232A192) (Audit Report). The OIG published the Audit Report after the Board's dismissal of the scoping portion of the Tribe's proposed Contention 8 in LBP-13-9.

[95] *Id.* at 24.

The Audit Report specifically identified the DSEIS for this project as deficient because it lacked a formal scoping process.[96]

We take review of the Board's denial of the Tribe's proposed Contention 8 with respect to scoping pursuant to 10 C.F.R. § 2.341(b)(4)(ii).[97] The Tribe's contention identifies an issue of law with respect to our NEPA scoping process. We find that the Board's reasoning was flawed because it relied on a section of our NEPA regulations (10 C.F.R. § 51.92) that is not applicable here. Despite this error on the part of the Board, we affirm the Board's ruling and find that, even without a separate scoping process on the SEIS, the Staff provided the Tribe with ample opportunities at an early stage in the process to participate in the development of the site-specific, supplemental EIS. The Tribe had the opportunity to participate in the NEPA process from the beginning, and it has not demonstrated harm or prejudice resulting from the lack of a separate, formal scoping process on the site-specific SEIS; thus, the Board's error was harmless.

We agree with the Staff's observation that tiering and supplementing are not mutually exclusive concepts.[98] However, we agree with the petitioners that the exception in 10 C.F.R. § 51.92(d) does not apply to a supplemental, site-specific EIS that tiers off a GEIS. Section 51.92(d) states: "[t]he supplement to a *final environmental impact statement* will be prepared in the same manner as the *final environmental impact statement* except that a scoping process need not be used."[99] This provision provides an exception from the scoping process for supplements to *final* EISs. The GEIS is not a final EIS for the purpose of the specific federal

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[96] *Id.* at 22; *see* Tribe's Petition at 7.

[97] We review questions of law *de novo*. *See Geisen*, CLI-10-23, 72 NRC at 242.

[98] *NRC Staff's Response to Oglala Sioux Tribe's Petition for Review of LBP-15-16* (June 22, 2015), at 8 (Staff's Response to Tribe).

[99] 10 C.F.R. § 51.92(d) (emphasis added).

action here—the proposed licensing of Powertech's *in situ* uranium recovery facility. The Powertech site-specific SEIS is not a supplement in the sense meant by 10 C.F.R. § 51.92(d). The Staff's reference to the SEIS for this project as a supplement does not change the applicability of the exception in 10 C.F.R. § 51.92(d)—it applies to supplements to final EISs, not site-specific supplements to a GEIS.

Because we determine that the Tribe is correct that 10 C.F.R. § 51.92 does not apply here, we now turn to the effect of the Board's error. After considering the Staff's involvement with the Tribe and other interested stakeholders throughout the NEPA process, we find that the Tribe has not shown that the lack of scoping resulted in harm or prejudice. Despite the fact that the Staff did not engage in a separate, formal scoping process in preparing the DSEIS, the Staff provided the Tribe with ample opportunities at an early stage in the process to participate in the development of the site-specific EIS.[100] For example, the Staff states that in 2009 it proposed a meeting with the Tribe to discuss the project, but that the Tribe was unable to attend.[101] Further, "[i]n early 2010, the Staff placed advertisements in six newspapers with circulation in the Dewey-Burdock area, including the Lakota Country Times and the Native Sun, inviting the public to comment on the Dewey-Burdock Project."[102] This public outreach demonstrates that the Tribe and the public had sufficient opportunity to provide input to the Staff regarding the scope of the Staff's environmental analysis. Moreover, the Staff conducted full scoping for the GEIS, which considered specific features of the Black Hills and identified Dewey-Burdock on

[100] *See, e.g.*, Staff's Response to Tribe at 8-9 (listing opportunities for the Tribe's participation).

[101] *Id.* at 8-9; *see* Tr. at 771.

[102] Staff's Response to Tribe at 9; *see* Ex. NRC-008-A-1, FSEIS § 1.4.2.

maps and figures. The GEIS also specified that it would serve as part of Dewey-Burdock's environmental analysis.[103]

It is well settled that parties challenging an agency's NEPA process are not entitled to relief unless they demonstrate harm or prejudice—and the Tribe has not done so here.[104] Federal case law makes clear that procedural violations of NEPA do not automatically void an agency's ultimate decision.[105] For example, in *Northwest Coalition for Alternatives to Pesticides v. Lyng*, although the Bureau of Land Management had not properly notified the plaintiff during the scoping process, the Ninth Circuit upheld the District Court's determination that the plaintiff was unable to demonstrate prejudice after having participated in the development of the EIS.[106] Also in *Lyng*, the court, discussing the high bar for overturning a federal administrative decision, referred to a Fourth Circuit case holding that individuals not given notice of public hearings on a proposed wastewater treatment plant did not suffer prejudice, even though they were not provided the opportunity to participate until "the eleventh hour" of the NEPA process.[107] Here, by contrast, the Tribe was involved from the beginning of the process, despite the acknowledged lack of formality in the scoping for this EIS.

Further, the scoping process is intended to provide notice to individuals potentially affected by the proposed federal action.[108] Here, although the Staff did not conduct a formal

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[103] *See* Staff's Response to Tribe at 9.

[104] *Nw. Coal. for Alts. to Pesticides v. Lyng*, 844 F.2d 588, 594-95 (9th Cir. 1988); *Cty. of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984); *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1086-87 (E.D. Cal. 2009); *Muhly v. Espy*, 877 F. Supp. 294, 300-01 (W.D. Va. 1995).

[105] *Lyng*, 844 F.2d at 595.

[106] *Id.* at 594-95.

[107] *Id.* at 595 (citing *Providence Rd. Cmty. Ass'n v. EPA,* 683 F.2d 80, 82 (4th Cir. 1982)).

[108] *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1116 (9th Cir. 2002) ("The primary purpose of the scoping period is to notify those who may be affected by a proposed government

scoping process for the DSEIS for the Dewey-Burdock project, the Tribe had ample notice of the project and numerous opportunities throughout the process to participate in the development of the DSEIS. The Tribe argues that it was "deprived … of the opportunity to present its concerns at the proper time," but it has not argued that any particular section of the site-specific EIS is deficient because of the lack of a formal scoping process.[109]

We are satisfied that the Tribe had the opportunity to provide input on the development of the DSEIS in this case; therefore, the Tribe has not demonstrated harm or prejudice resulting from the lack of a formal scoping process. We find that any error by the Board was harmless and decline to order a hearing on the merits of this contention.[110]

3. Consolidated Intervenors' Proposed Contention D

a. Proposed Contention and Board Order

Consolidated Intervenors challenge the Board's partial denial of their proposed Contention D in LBP-10-16.[111] In the dismissed part of Contention D, Consolidated Intervenors argued that Powertech's application violated 10 C.F.R. § 40.9 "by being disorganized …."[112] In

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action which is governed by NEPA that the relevant entity is beginning the EIS process; this notice requirement ensures that interested parties are aware of and therefore are able to participate meaningfully in the entire EIS process, from start to finish." (citing *Lyng*, 844 F.2d at 594–95)), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

[109] Tribe's Petition at 8.

[110] Notably, the Tribe has not articulated a request for any specific relief regarding the Board's dismissal of this portion of Contention 8 on the DSEIS. Because the Staff has revised its guidance to provide for scoping for future supplemental EISs that tier off of a generic EIS, we decline to delve into the underlying legal issue. Memorandum from Catherine Haney, NMSS, to Stephen D. Dingbaum, OIG (June 30, 2015), at 2 (ML15166A406).

[111] Consolidated Intervenors' Petition at 2 n.3, 3-4, 7. In their petition for review, Consolidated Intervenors cite LBP-15-16 as the Board order that dismissed portions of their proposed Contention D. *Id.* at 2 n.3. To clarify, the Board actually held inadmissible the relevant portions of Contention D in LBP-10-16. *See* LBP-10-16, 72 NRC at 402-03.

[112] Consolidated Intervenors' Petition to Intervene at 36; *see* LBP-10-16, 72 NRC at 400-01. The Board only denied Consolidated Intervenors' Contention D with respect to the

denying this portion of Contention D, the Board found that the application was not "so incomprehensible as to be useless to the public" and stated that "issues of disorganization in an application cannot be said to be germane to the licensing process."[113]

b. Consolidated Intervenors' Petition for Review

On appeal, Consolidated Intervenors argue that the Board created "new standards for accuracy and completeness under [10 C.F.R. § 40.9]" and held "that [a]pplications must be 'incomprehensible' and 'useless to the public' to be deficient under [10 C.F.R. § 40.9]."[114] They claim that the Board's decision "undermines the entire purpose of having an [a]pplication if the standard is so low that it will pass muster if it is barely comprehensible and a hair better than 'useless.'"[115] Finally, Consolidated Intervenors argue that "[t]he public has a strong interest in the standard for accuracy and completeness of source material license applications being higher than that set by the Board ('incomprehensible'[;] 'useless to the public')."[116]

We find that Consolidated Intervenors have not identified a substantial question for our review here. They have not demonstrated that the Board erred at law or abused its discretion in dismissing this portion of Contention D. Consolidated Intervenors have misconstrued the Board's holding; the Board did not adopt or create a new standard for an application to be deemed deficient under 10 C.F.R. § 40.9. Rather, the Board determined that Powertech's application was sufficiently comprehensible for compliance with our regulations. That is, the

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comprehensibility of the application. LBP-10-16, 72 NRC at 402-03. The Board admitted portions of the contention that related to the technical adequacy of baseline water quality and adequate confinement of the host aquifer. *Id.* at 403.

[113] *Id.* at 402-03 (quoting *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 280 (1998)).

[114] Consolidated Intervenors' Petition at 2 n.3, 7.

[115] *Id.* at 3-4.

[116] *Id.* at 7.

Board simply disagreed with Consolidated Intervenors' argument that the application was incomprehensible and useless. Pursuant to 10 C.F.R. § 2.341(b)(4)(i), we will take review of a Board's factual findings when those findings are clearly erroneous or in conflict with a finding regarding the same fact in a different proceeding.[117] Consolidated Intervenors have not raised a substantial question with respect to the Board's factual conclusions here. Therefore, we deny Consolidated Intervenors' petition for review.

C. New Contentions Held Inadmissible

The Tribe has petitioned for review of the Board's ruling in LBP-15-16 finding its two newly proposed contentions inadmissible.[118] The Tribe filed these two contentions after the conclusion of the evidentiary hearing in August 2014 in response to the Board's post-hearing order directing Powertech to disclose to all parties additional information regarding borehole log data concerning the project site.[119] The Staff reviewed the data and determined that it did not contradict the findings in the FSEIS.[120] Thereafter, the Tribe proposed two new contentions: the first related to the Staff's October 2014 submissions regarding the data and the second related to EPA documents regarding potential CERCLA cleanup at the Powertech site.[121]

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[117] *See Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[118] Tribe's Petition at 8-11; *see* LBP-15-16, 81 NRC at 704-06.

[119] Post Hearing Order (Sept. 8, 2014), at 19 (unpublished) (Post-Hearing Order); *see* Ex. OST-19, Press Release, Powertech Uranium Corp., Powertech Uranium (Azarga Uranium) Enters into Data Purchase Agreement for Dewey-Burdock Project (July 16, 2014) (ML14247A415).

[120] *NRC Staff's Motion to Admit Testimony and Exhibits Addressing Powertech's September 14, 2014 Disclosures* (Oct. 14, 2014), at 1; Ex. NRC-158, Supplemental Testimony Regarding NRC Staff Analysis of TVA Well Log Data (Oct. 14, 2014), at 12 (ML14344A931) (Staff's Supplemental Testimony).

[121] Tribe's Motion for New Contentions at 2-3.

1. The Tribe's New Contention 1

a. Proposed Contention and Board Order

In its first new contention, the Tribe argued that the Staff was required to evaluate the well log data as part of the NEPA process, and that the methodology the Staff used to evaluate the well logs (by conducting a "spot check") was unacceptable.[122]

The Board found that the contention did not meet the requirements of 10 C.F.R. § 2.309(c)(1)(ii) because the information in the well logs was not materially different from information already in the record.[123] The Board also noted that the Tribe failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) because it had not raised a genuine dispute on a material issue of law or fact—the Staff's method for evaluating borehole data by reviewing representative borehole logs had not changed throughout the proceeding.[124] Further, the Board noted that the Tribe had not met the requirements in 10 C.F.R. § 51.92 for demonstrating the need to supplement a FSEIS—in particular that the information in question was "new and significant."[125]

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[122] *Id.* at 6-9.

[123] LBP-15-16, 81 NRC at 704-05. *See* 10 C.F.R. § 2.309(c)(1)(i)-(iii); *see also* Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012) (clarifying the requirements governing hearing requests, intervention petitions, and motions for leave to file new or amended contentions). Although this proceeding began in 2009, the Board ruled on the Tribe's proposed new contentions in 2015 and had previously adopted the 2012 amendments to 10 C.F.R. Part 2 for this proceeding. Order (Concerning Changes to 10 C.F.R. Part 2) (Aug. 21, 2012) (unpublished).

[124] LBP-15-16, 81 NRC at 705.

[125] *Id.* The Tribe objects to the Board's discussion of this point in its petition for review. The Tribe argues that the Board "conflate[d] the contention admissibility standard with the substantive standard of whether the new information would require a supplement to the NEPA documents." Tribe's Petition at 9. Regardless, the Tribe's challenge does not raise a substantial question for review, because the Tribe's New Contention 1 did not meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(ii) and 2.309(f)(1)(vi). If the information is not materially different from previously available information, it stands to reason that it does not "paint a seriously different picture of the environmental landscape" for this proceeding. *Hydro*

b. The Tribe's Petition for Review

On appeal, the Tribe argues that the Board's denial of the Tribe's request to develop and present its contention presents a substantial question for review.[126] It challenges the Board's factual determinations that new well log data did not present materially different information and that the NRC's "spot check" methodology has been used throughout the Staff's review and issuance of the Powertech's license.[127] But this challenge does not show how the Board's determination here is in error. The Board determined that the Tribe did not present any information that was materially different than what was previously available.[128] The Tribe raised this contention after the hearing was complete and the Board had the benefit of hearing from all of the parties on the borehole information and the Staff's review methodology. On appeal, the Tribe does not give us a reason to find that the Board, which was familiar with the information available throughout the pendency of the proceeding, committed an error or abuse of discretion. Therefore, we decline to take review of the Board's dismissal of this contention as inadmissible.

2. The Tribe's New Contention 2

a. Proposed Contention and Board Order

In its second new contention, the Tribe argued that the Staff had not considered in its NEPA analysis information in a newly released EPA assessment regarding a historic hardrock

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Resources, Inc., CLI-99-22, 50 NRC at 14 (quoting *Sierra Club v. Froehike*, 816 F.2d 205, 210 (5th Cir. 1987)).

[126] The Tribe argues that the Board's post-hearing order provides support for its argument that rejection of this contention presents a substantial question for review. Tribe's Petition at 10. There, the Board ordered disclosure of various documents. Post-Hearing Order at 10-12, 19. The Board denied the Tribe's request for sanctions, and denied Powertech's motion for reconsideration. *Id.* at 12, 16. While the Tribe's description of the Board's post-hearing order is accurate, those rulings do not support its petition for review.

[127] Tribe's Petition at 8-10.

[128] *See* LBP-15-16, 81 NRC at 704-05; *see also* Ex. NRC-158, Staff's Supplemental Testimony, at 9-13.

uranium mine site within the Dewey-Burdock project area.[129] The Tribe argued that "the EPA states that it has determined that a CERCLA removal action is recommended for the site and will proceed."[130] In its contention, the Tribe asserted that the CERCLA removal action was therefore reasonably foreseeable, and that the Staff should have considered the action in the cumulative impacts analysis in the EIS.[131]

The Board held this contention inadmissible because the Tribe "fail[ed] to present sufficient information to show a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi)."[132] Moreover, the Board found that the Tribe disregarded the analysis in the FSEIS of the environmental concerns raised in the EPA Preliminary Assessment, as well as the EPA Preliminary Assessment's repeated references to the FSEIS.[133] Given that the EPA documents themselves referred to the Staff's analysis in both the DSEIS and FSEIS, the Board concluded that the Tribe had not met the contention admissibility requirements, specifically 10 C.F.R. § 2.309(f)(1)(vi).[134]

b. The Tribe's Petition for Review

In its petition for review, the Tribe argues that the Board erred because it "glossed over" the fact that "[t]he EPA identified a new contamination pathway with implications for pollution containment at the site that is not addressed in the application, any NRC materials, or the

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[129] Tribe's Motion for New Contentions at 11; *see also* Ex. OST-026, Letter from Ryan M. Lunt, Task Order Project Manager, Seagull Envtl. Techs., Inc., to Victor Ketellapper, Site Assessment Team Leader, U.S. Envtl. Prot. Agency, Region 8 (Sept. 24, 2014), attach. "Preliminary Assessment Report Regarding the Darrow/Freezeout/Triangle Uranium Mine Site Near Edgemont, South Dakota" (ML14344A926).

[130] Tribe's Motion for New Contentions at 11.

[131] *Id.*

[132] LBP-15-16, 81 NRC at 706.

[133] *Id.*

[134] *Id.*

FSEIS."[135] The Tribe asserts that the FSEIS discusses the unreclaimed mines but does not address "the contamination pathway from the unreclaimed mines to the groundwater" and argues that this presents a substantial question for our review.[136]

Contrary to the Tribe's argument on appeal, the Board did not overlook the Tribe's arguments regarding environmental concerns related to the abandoned mines. In finding New Contention 2 inadmissible, the Board determined that the Tribe had "fail[ed] to show that the Preliminary Assessment is or contains significant new information" and therefore did not demonstrate a genuine dispute on a material issue of law or fact.[137] The Board's ruling was based on its determination that the information in the Preliminary Assessment, including information regarding groundwater contamination, did not differ significantly from that in the FSEIS so as to demonstrate that a genuine dispute existed on a material issue of law or fact.[138] The Tribe's petition does not raise a substantial question regarding the Board's finding that the information in the Preliminary Assessment about unreclaimed mines was insufficient to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Therefore, we deny review of the Board's dismissal of New Contention 2.

We now turn to the parties' claims with respect to the Board's merits decision.

D. Contentions Decided on the Merits

1. Contentions 1A and 1B

As we discuss in detail below, we find that the Board's ruling on Contentions 1A and 1B is final, and consideration of the petitions for review under 10 C.F.R. § 2.341(b)(4) is appropriate at this time. We deny each party's petition for review with respect to Contentions 1A and 1B—

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[135] Tribe's Petition at 11.

[136] *Id.*

[137] LBP-15-16, 81 NRC at 706.

[138] *Id.*

thus leaving in place the Board's ruling in favor of the Tribe and Consolidated Intervenors. Further, under our inherent supervisory authority over agency adjudications, we leave the proceeding open for the narrow issue of resolving the deficiencies identified by the Board.

a. Partial Initial Decision

First, we must clarify the appropriate standard of review of the Board's decision on these contentions. By its terms, the Board presented LBP-15-16 as a "partial initial decision" that left the ultimate resolution of Contentions 1A and 1B for a future decision.[139] Under this approach, the Board retained jurisdiction pending the Staff's remedy of the deficiencies the Board identified in the Board's ruling on Contentions 1A and 1B.[140] Each party, in turn, questioned the Board's decision to retain jurisdiction.[141]

The Board received full briefing and held oral argument and a merits hearing on the issues raised in Contentions 1A and 1B. The Board found in favor of the Tribe and Consolidated Intervenors and identified deficiencies in the Staff's efforts to comply with NEPA and the NHPA.[142] With briefing on these issues completed and the Board's having found in favor of the Tribe and Consolidated Intervenors, we find that the Board's resolution of Contentions 1A and 1B is final and consideration of the petitions for review of these contentions is appropriate at this time.[143]

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[139] *Id.* at 658, 710.

[140] *Id.*

[141] Consolidated Intervenors' Petition at 2 & n.3, 3, 6-7; Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16; *see also* Tribe's Petition at 18-19 (arguing that the "proper remedy" is to "vacate the [licensing] decision and remand back to the agency for further proceedings").

[142] *See* LBP-15-16, 81 NRC at 708.

[143] *See* 10 C.F.R. § 2.341(b)(4); *Pa`ina*, CLI-10-18, 72 NRC at 69-74 (fully reviewing appeals from a licensing board order on an issue where the board ruled in favor of the intervenor on the merits but directed further corrective action); *Vermont Yankee*, CLI-10-17, 72 NRC at 4-9 (same).

b. Contentions and Board Order

In Contention 1A, the Tribe and Consolidated Intervenors challenged the FSEIS's treatment of historic and cultural resources under the NHPA and NEPA.[144] In Contention 1B, the Tribe and Consolidated Intervenors challenged the adequacy of the Staff's NHPA consultation process.[145]

With respect to Contention 1A, the Board held that the Staff had complied with the NHPA requirement to "make a good faith and reasonable effort to identify properties … eligible for inclusion in the National Register of Historical Places within the Dewey-Burdock [*in situ* leach] project area."[146] The Board found that the Staff had largely complied with Advisory Council on Historic Preservation (ACHP) guidance on identification of historic properties.[147] However, with respect to the Staff's NEPA responsibilities, the Board found insufficient the Staff's analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, historic, and religious resources.[148] Accordingly, it held that the Record of Decision was incomplete because the Staff "did not give this issue its required hard look in the FSEIS."[149] Regarding Contention 1B, section 106 consultation, the Board acknowledged that it could not

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[144] Tribe's FSEIS Contentions at 5-9; Consolidated Intervenors' FSEIS Contentions at 6-14. The Tribe and Consolidated Intervenors previously filed similar contentions on the application and the DSEIS. *See* Tribe's DSEIS Contentions at 4-10; Consolidated Intervenors' DSEIS Contentions at 2-7; *Petitioners' Request for Leave to File a New Contention Based on SUNSI Material* (April 30, 2010), at 1-6; Tribe's Petition to Intervene at 12-17.

[145] Tribe's FSEIS Contentions at 9-14; Consolidated Intervenors' FSEIS Contentions at 14-20. The Tribe previously filed similar contentions on the application and the DSEIS. Tribe's DSEIS Contentions at 4-10; Tribe's Petition to Intervene at 12-17.

[146] LBP-15-16, 81 NRC at 654.

[147] *Id.*

[148] *Id.* at 655. More specifically, the Board found a deficiency in the analysis of sites that might be significant to the Oglala Sioux Tribe.

[149] *Id.*

definitively determine whether the Staff or the Tribe bore responsibility for what the Board considered a breakdown in consultation. But the Board found that the NHPA consultation process between the Staff and the Tribe was inadequate because it did not provide sufficient opportunity for the Tribe to articulate its views on the Dewey-Burdock project's effects on historic properties and participate in the resolution of adverse effects.[150]

The Board directed the Staff to conduct additional consultation with the Tribe "to satisfy the hard look at impacts required by NEPA … [and] to satisfy the consultation requirements of the NHPA."[151] By the terms of its order, the Board issued a partial initial decision with respect to these contentions and, therefore, retained jurisdiction over the proceeding pending the Staff's curing of the deficiencies in the FSEIS and consultation with the Tribe.[152] On appeal, each party challenged the Board's issuance of a partial initial decision and retention of jurisdiction.[153]

c. Petitions for Review

(1) THE TRIBE'S AND CONSOLIDATED INTERVENORS' PETITIONS FOR REVIEW

Although the Board found in favor of the Tribe and Consolidated Intervenors, both parties have appealed the relief the Board granted with respect to these contentions.

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[150] *Id.* at 656-57.

[151] *Id.* at 657. The Board noted that it could have suspended Powertech's license, and it attributed its decision to leave the license in place to the Tribe's incomplete participation in the consultation process. *Id.* at 658.

[152] *Id.* at 710.

[153] Consolidated Intervenors' Petition at 2 & n.3, 3, 6-7; Powertech's Petition at 5-6, 6 n.9; Staff's Petition at 13-16; *see also* Tribe's Petition at 18-19 (arguing that the "proper remedy" is to "vacate the [licensing] decision and remand back to the agency for further proceedings").

(a) The Tribe's Petition for Review

The Tribe challenges the Board's decision to leave the license in place, despite finding that the NRC Staff's analysis did not comply with NEPA or the NHPA.[154] Given the Board's decision, the Tribe argues that NEPA and the NHPA prohibit the Board from leaving the license in place and asserts that "the proper remedy is that employed by federal courts up[on] a finding of a violation of NEPA: to vacate the decision and remand back to the agency for further proceedings necessary to achieve compliance."[155]

We disagree. It is well settled that a failure to comply with every aspect of procedural statutes like those at issue here does not necessarily void agency action; federal courts have required that parties demonstrate harm or prejudice to disturb an agency's decision.[156] Here, the Tribe has not articulated any harm or prejudice; in fact, it did not request a stay of the effectiveness of the license, despite the Board's invitation for it to do so.[157] Nor has the Tribe raised a substantial question that would merit granting its petition for review with respect to this issue.[158] Therefore, we deny this portion of the Tribe's petition for review and its request that we vacate Powertech's license.

(b) Consolidated Intervenors' Petition for Review

Consolidated Intervenors argue that "the Board improperly withheld an initial decision and refused to rule on Contentions 1A [and] 1B thereby depriving the Tribe and tribal

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[154] Tribe's Petition at 19.

[155] *Id.* (citing *New York*, 681 F.3d at 471).

[156] *Lyng*, 844 F.2d at 594-95; *Cty. of Del Norte*, 732 F.2d at 1467; *Cent. Delta Water Agency*, 653 F. Supp. 2d at 1086-87; *Muhly*, 877 F. Supp. at 300-01.

[157] *See* LBP-15-16, 81 NRC at 658.

[158] *See Pa`ina*, CLI-10-18, 72 NRC at 69-74 (noting that the board ruled in favor of the intervenor after a merits hearing but directed the parties to undertake additional action to cure identified deficiencies); *Vermont Yankee*, CLI-10-17, 72 NRC at 4-9 (same).

members … an opportunity to appeal the Board's decision."[159] Despite their argument that the Board's decision deprived them of an opportunity to appeal the decision, Consolidated Intervenors challenge the Board's decision to leave the license in place—tying their objection to the NRC's federal trust responsibility.[160] But they do not articulate why the federal trust responsibility precludes the Board from finding as it did; nor do Consolidated Intervenors attempt to demonstrate the existence of a substantial question that would merit granting their petition for review. Instead, they argue that the Board misconstrued the trust responsibility federal agencies owe to the Tribe by "presuming that the Tribe will act '[u]nreasonably.'"[161] This argument misconstrues the Board's decision and does not raise a legal question or demonstrate factual error on the part of the Board. In ruling on Contentions 1A and 1B, the Board did not presume that the Tribe would act unreasonably. Rather, the Board stated that "[e]ven after a thorough review of the record … [it was] not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey."[162] Therefore, the Board directed the Staff to resume consultation with the Tribe, but it reminded the Tribe of its obligation to engage in a meaningful manner with the Staff.[163] We do not see how this statement presumes any unreasonable action or misconstrues the NRC's trust responsibility, nor does it satisfy our standards for granting a petition for review. Therefore, we deny Consolidated Intervenors' petition for review with respect to these contentions.

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[159] Consolidated Intervenors' Petition at 2.

[160] *Id.* at 3.

[161] *Id.*; *see also id.* at 6.

[162] LBP-15-16, 81 NRC at 656.

[163] *Id.* at 657-58, 658 n.236.

(2) POWERTECH AND THE STAFF'S PETITIONS FOR REVIEW

Powertech and the Staff appeal the Board's rulings on Contentions 1A and 1B as well as the Board's retention of jurisdiction.[164]

(a) Powertech's Petition for Review

On appeal, Powertech argues, at length, that the Board's ruling on Contentions 1A and 1B was inconsistent, legally flawed, and factually incorrect. Specifically, Powertech claims that the Board erred in finding the Staff's NHPA analysis deficient by committing clear error of law, ignoring the ACHP's determinations regarding the propriety of the Staff's analysis, providing "special treatment" to the Tribe as a litigant and consulting party, and ignoring critical facts regarding the nature of the government-to-government consultation between the NRC Staff and the Tribe.[165] With respect to the Board's NEPA determination, Powertech argues that the Board erred in finding that the Staff's analysis does not comply with NEPA. In Powertech's view, the NRC Staff has satisfied its NEPA obligation to assess the impacts to historic and cultural resources by considering and evaluating all the available information or information that could reasonably be obtained.[166] Powertech asserts that in requiring more from the Staff, the Board has committed a clear error of law.[167] We disagree. At bottom, Powertech's dispute with the Board's decision is factual, not legal. When assessing a petition for review on factual issues, we typically defer to a Board's findings, absent a showing of clear error.[168] Here, Powertech challenges the Board's weighing of the evidence to find that the Staff's NEPA and NHPA

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[164] Powertech's Petition at 6-22; Staff's Petition at 14-25.

[165] Powertech's Petition at 7, 9-11, 16.

[166] *Id.* at 20-22.

[167] *Id.* at 17.

[168] 10 C.F.R. § 2.341(b)(4)(i).

analyses do not satisfy the NRC's statutory obligations. For example, with respect to the Staff's NEPA analysis, Powertech claims that the Staff considered and evaluated "all available information or information that reasonably could be obtained ...."[169] Yet none of Powertech's claims show clear error on the part of the Board, absent which we will not reconsider the Board's resolution of factual issues.[170] We therefore deny Powertech's petition for review with respect to the Board's findings in Contentions 1A and 1B.

(b) The Staff's Petition for Review

On appeal, the Staff argues that the Board misapplied NEPA's hard look standard as a matter of law, under which the Board should assess whether the Staff "made reasonable efforts" to obtain complete information on the cultural resources at issue here.[171] In its brief, the Staff describes the efforts it undertook and argues that these efforts were sufficient to meet the hard-look standard.[172] The Staff asks us to view the Board's application of the hard-look standard as a legal issue under 10 C.F.R. § 2.341(b)(4)(ii).[173] But the fundamental issue here—whether Staff complied with NEPA—is inherently factual.

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[169] Powertech's Petition at 21-22.

[170] We recognize that, as Powertech notes, the ACHP participated in the section 106 process and concluded that the NRC Staff's process complies with the "content and spirit" of the section 106 process. Ex. NRC-031, Letter from John Fowler, ACHP, to Waste Win Young, Standing Rock Sioux Tribe, at 3 (Apr. 7, 2014) (ML14241A473); *see* Powertech's Petition at 3, 9, 11, 15-16. The Staff likewise asks us to treat the ACHP's and North Dakota SHPO's views as dispositive of the fact that it complied with the NHPA. Staff's Petition at 24. Here, where the Board has weighed the relevant facts, including the cited exhibits, and determined that the Staff has not satisfied its obligations under the NHPA and NEPA, we will not disturb the Board's findings absent clear error.

[171] Staff's Petition at 17-18.

[172] *Id.* at 19-20.

[173] *Id.* at 17.

As a general matter, we defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[174] Here, the Board weighed the evidence and determined that the analysis of the environmental effects on cultural resources in the FSEIS was insufficient.[175] The Staff challenges this determination, describing the efforts it made to gather information on cultural resources, but the Staff has not demonstrated that the Board's findings are clearly erroneous.[176] Given the complexity of this proceeding, which involved hundreds of exhibits and over five years of litigation, we are not inclined to second guess the Board's fact-finding.

The Staff next challenges the Board's determination that, on the one hand, the Staff complied with the NHPA regarding identification of historic properties, but the Staff's analysis of cultural, religious, and historic resources under NEPA was insufficient. It argues that the Board's finding that it had complied with the NHPA in identifying historic properties compels the Board to conclude that the Staff also complied with NEPA with respect to cultural resources.[177] The Staff acknowledges that the Board relied on precedent in stating that NEPA compliance does not necessarily follow from NHPA compliance.[178] But it challenges the Board's application of that legal principle to the facts in this case, stating that it had taken a hard look at cultural resources in the FSEIS and arguing that "[t]he Board did not cite any authority supporting its divergent findings on whether the Staff complied with a common requirement of both

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[174] *Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[175] LBP-15-16, 81 NRC at 644-55.

[176] Staff's Petition at 19-20.

[177] *Id.* at 21-22.

[178] *Id.*; *see* LBP-15-16, 81 NRC 654-55 (citing *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606, 610 (9th Cir. 2010); *Hydro Resources, Inc.* (P.O. Box 777 Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442, 472 (2005)).

statutes ...."[179] The Staff's challenge to the Board's alleged failure to cite authority for its findings is misplaced. Federal case law supports the legal principle that NHPA and NEPA compliance do not necessarily mirror one another.[180] The Board found that NEPA requires an analysis of the effects on all of the cultural resources present at the site, not only those properties eligible for listing on the National Register of Historic Places, which is the standard for further analysis under the NHPA.[181] The Staff does not demonstrate that the Board's factual finding was implausible. Therefore, we decline to disturb the Board's finding here.

Next, the Staff seeks review of the Board's ruling on Contention 1B that the Staff failed to adequately consult with the Tribe under the NHPA.[182] The Staff argues that the Board's holdings on Contentions 1A and 1B are contradictory because in Contention 1A the Board held "that the Staff complied with the NHPA when identifying cultural resources" while in Contention 1B, the Board held that the NHPA consultation process was inadequate.[183] But the Board's rulings on compliance with the NHPA are not contradictory; its rulings on NHPA compliance in Contentions 1A and 1B relate to different obligations.

The NHPA imposes several obligations on federal agencies, which proceed in a step-by-step manner.[184] The consultation requirement continues throughout the steps. The first step is identifying any historic properties that might be affected by the federal undertaking (here

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[179] Staff's Petition at 22.

[180] *See Te-Moak*, 608 F.3d at 606-07, 610.

[181] *See* 36 C.F.R. § 800.4 (requiring agencies to identify "historic properties"); *id.* § 800.16 (defining historic properties as "districts, sites, buildings, structures, or objects included in or eligible for inclusion in, the National Register of Historic Places"); *see generally id.* § 60.4 (providing the criteria for inclusion in the National Register of Historic Places).

[182] Staff's Petition at 23.

[183] *Id. Compare* LBP-15-16, 81 NRC at 654, *with id.* at 657.

[184] *Id.* at 638-41.

licensing), and in doing so, making a reasonable and good faith effort to seek information from consulting parties, including Native American Tribes, to aid in that identification.[185] In ruling on Contention 1A, the Board determined that the Staff had satisfied the NHPA's consultation requirements with respect to identifying historic properties.[186] In other words, the Board determined that the Staff had satisfactorily completed the first step in the process.

But, as discussed by the Board, the identification of historic properties is not the end of the NHPA consultation process. After it identifies eligible sites that might be affected by the project, an agency must assess[187] and resolve[188] potential adverse effects in consultation with tribes that attach religious and cultural significance to those sites.[189] In its ruling on Contention 1B, the Board found that the Staff had not adequately consulted with the Tribe on the second and third steps; that is, despite its good faith effort to consult in order to identify historic properties, the Staff had not demonstrated that it provided the Tribe with the opportunity to identify concerns about those properties and participate in the resolution of any adverse effects.[190] The Board, after a merits hearing, reasonably concluded that the Staff's consultation with the Tribe was insufficient to meet these requirements. Thus, the Staff has not raised a substantial question for review. For the reasons stated above, we deny review of the Staff's petition with respect to Contentions 1A and 1B.

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[185] 36 C.F.R. § 800.4.

[186] LBP-15-16, 81 NRC at 654.

[187] 36 C.F.R. § 800.5.

[188] *Id.* § 800.6.

[189] *Id.* § 800.2(c)(2)(ii)(A).

[190] LBP-15-16, 81 NRC at 656-57. *See also* 36 C.F.R. § 800.2(c)(2)(ii)(A).

(3) RETENTION OF JURISDICTION

Both the Staff and Powertech appeal the Board's retention of jurisdiction pending resolution of the deficiencies identified in Contentions 1A and 1B.[191] In retaining jurisdiction, the Board directed the Staff to: (1) initiate government-to-government consultation with the Tribe; (2) file monthly status reports; and (3) submit "an agreement reflecting the parties' settlement … or a motion for summary disposition of Contentions 1A and 1B."[192] Both the Staff and Powertech argue that in each instance the Board "exceeded its authority" by retaining jurisdiction over the proceeding and prescribing "a process for the Staff to resolve" the deficiencies identified in Contentions 1A and 1B.[193] Consolidated Intervenors also questioned the Board's retention of jurisdiction over these contentions. Consolidated Intervenors argue that doing so constitutes prejudicial procedural error.[194]

With respect to the Board's specific direction to the Staff to initiate "government-to-government" consultation, we agree in principle with the Staff and Powertech. To the extent that the Board's ruling can be viewed as providing specific direction to the Staff, the Board overstepped its authority.[195] But, based upon our review of the Board's decision, the Board has not stated that it will direct or oversee the Staff's review of cultural resources; instead, it leaves it to the Staff—either by agreement among the parties or by motion for summary disposition—to

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[191] Staff's Petition at 15-16; Powertech's Petition at 6.

[192] LBP-15-16, 81 NRC at 708, 710.

[193] Staff's Petition at 15-16; *see also* Powertech's Petition at 5-6, 6 n.9.

[194] Consolidated Intervenors' Petition at 6-7.

[195] *See, e.g.*, *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("NRC Staff Reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not the licensing boards.").

determine when it has addressed the deficiencies identified by the Board.[196] All the Board has required is that the Staff provide reports regarding its consultation efforts in a manner similar to that in which it reports on the progress of its review and the Board's directions to the parties in this respect do not exceed the bounds of its authority. Our regulations provide the Board with the authority to "take appropriate action to control the … hearing process," "[r]egulate the course of the hearing and the conduct of the participants," and "[i]ssue orders necessary to carry out the presiding officer's duties and responsibilities under [10 C.F.R. Part 2]."[197] In circumstances like these, we have made it clear that a Board has relative latitude to fashion appropriate remedies regarding issues properly before it.[198] The Staff is free to select whatever course of action it deems appropriate to address the deficiencies identified in the Board's order, including, but not limited to further government-to-government consultation.[199] For these reasons, we decline to disturb the Board's approach—the Staff must still file monthly reports, along with an agreement or a motion for summary disposition—depending on the outcome of its efforts to

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[196] LBP-15-16, 81 NRC at 710.

[197] 10 C.F.R. § 2.319.

[198] *Pa`ina*, CLI-10-18, 72 NRC at 96 (affirming the Board's decision to require an additional period for written public comment on a supplemental EA); *see also Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206 (1978) ("[T]he boards have broad and strong discretionary authority to conduct their functions with efficiency and economy. However, they must exercise it with fairness to all the parties …." (citation omitted)); *Wisconsin Electric Power Co., et al.* (Point Beach, Unit 2), ALAB-82, 5 AEC 350, 351 (1972) ("Administrative agencies and courts have long been accepted as 'collaborative instrumentalities of justice.'" (quoting *United States* v. *Morgan*, 313 U.S. 409, 422 (1941))); *Duke Power Co., et al.* (Catawba Nuclear Station, Units 1 and 2), LBP-83-24A, 17 NRC 674, 680 (1983).

[199] We note, however, that in licensing reviews such as this one, where Native American Tribes could be affected by the NRC's licensing action, we expect the Staff's actions to be guided by the principles outlined in the NRC's Tribal Protocol Manual. "Tribal Protocol Manual," NUREG-2173 (2014) (ML14274A014).

address the deficiencies. Therefore, we deny Powertech's, the Staff's, and Consolidated Intervenors' petitions for review of the Board's retention of jurisdiction over these contentions.

2. Contention 2

a. Contention and Board Order

The Tribe seeks review of the Board's resolution of Contention 2 in favor of Powertech and the Staff. In Contention 2, the Tribe argued that

> the FSEIS violates 10 C.F.R. Part 40, Appendix A, Criterion 7, 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations … in that it fails to provide an adequate baseline groundwater characterization or demonstrate that ground water samples were collected in a scientifically defensible manner, using proper sample methodologies.[200]

The Tribe also challenged the fact that "while the FSEIS contains data from 2007-2009, the background water quality for use in the actual regulatory process for the facility will be established [at] a future date, outside of the NEPA process, and outside of the public's review."[201] The Tribe objected to the collection of additional background groundwater quality data after issuance of the license, but before the facility begins operating, and argued that the practice violates NEPA.[202]

In ruling on Contention 2, the Board noted that NRC case law supports the industry practice of definitively establishing groundwater quality baselines after licensing but before operation.[203] Additionally, the Board noted that it found the testimony offered by the Staff's and Powertech's witnesses more detailed and persuasive than the testimony offered by the Tribe's

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[200] Tribe's Post-Hearing Brief at 38.

[201] *Id.* at 39.

[202] *Id.* at 38-39.

[203] LBP-15-16, 81 NRC at 665 (quoting *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 6 (2006)).

witness.[204] In reaching its decision, the Board examined the Tribe's exhibits regarding the EPA's Preliminary Assessment to determine that document's relevance to this contention.[205] The Board found unavailing the Tribe's argument that the conclusions in the Preliminary Assessment translated to an insufficient discussion of historic mining operations in the FSEIS.[206]

b. The Tribe's Petition for Review

On appeal, the Tribe challenges the Board's ruling, claiming that the Board erred as a matter of law when it permitted Powertech to defer collection of groundwater data to after licensing but before operation.[207] Based on our review of the record, we find that the Tribe has not raised a substantial question of law with respect to the applicable standards for site characterization. The Tribe mischaracterizes the Board's ruling when it claims that the Board allowed the Staff and Powertech to defer gathering groundwater data until after licensing.[208] The Board did not rule that "meaningful" baseline characterization may be deferred until the post-licensing period. Rather, it held that the pre-licensing groundwater monitoring used to describe the site for NEPA purposes need not conform to the post-licensing, pre-operation groundwater monitoring requirements applicable to a licensed facility because the monitoring

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[204] *Id.* at 666.

[205] *Id.*

[206] *Id.* The Board reasoned that the conclusion in the Preliminary Assessment that lack of groundwater sampling data limited the availability of background concentrations did not force a conclusion that the FSEIS's discussion of background water quality data was insufficient. It explained that the Preliminary Assessment was focused on CERCLA and the FSEIS was focused on our environmental regulations and the CEQ regulations. CERLCA's objectives are different from NEPA's objectives. With respect to CERCLA, it is important to determine the background levels to assess the impact of *past* mining activities on the site. By contrast, for NEPA purposes, the site's current baseline is important to determine the potential future impacts of the proposed project on the site.

[207] Tribe's Petition at 19-20.

[208] *Id.* at 20.

activities at these two stages serve different purposes.[209] We see no substantial question of law relating to NEPA's site characterization requirements.

The Tribe further asserts that the Board "committed … error and abused its discretion" by not requiring the Staff to account for past mining activity in its baseline water quality data.[210] In support of this argument, the Tribe argues that "[t]he Board even ignored evidence from the EPA Preliminary Assessment … confirming the lack of meaningful data as to the impacts associated with historic mining at the site and how that impacts current water quality and future impacts from the Dewey-Burdock site."[211] Contrary to the Tribe's assertions, the Board did not disregard the Preliminary Assessment; it specifically addressed the Tribe's argument regarding the Preliminary Assessment in its decision.[212] The Board found that due to the different objectives of NEPA and CERCLA, the Preliminary Assessment's finding regarding background data did not impact the adequacy of the analysis in the FSEIS.[213] The Tribe does not explain how the Board's determination on this point constitutes clear error or abuse of discretion.[214] The

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[209] LBP-15-16, 81 NRC at 665 (quoting *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), LBP-15-3, 81 NRC 65, 91-92 (2015)). In the *Strata* proceeding, we recently denied review of the Board's decision on a contention that was substantially similar to the Tribe's Contention 2, on the same grounds. *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566, 583-84 (2016) ("[T]he groundwater monitoring used to describe the environmental conditions at the site for NEPA purposes need not conform to the groundwater monitoring requirements applicable to an operating facility. The two standards serve different purposes.") (citations omitted).

[210] Tribe's Petition at 20.

[211] *Id.*

[212] LBP-15-16, 81 NRC at 666.

[213] *Id.*

[214] *See* Tribe's Petition at 20.

Tribe does not present a substantial question for review with respect to the Board's ruling on Contention 2; therefore, we decline to take review.[215]

3. Contention 3

a. Contention and Board Order

In Contention 3, the Tribe and Consolidated Intervenors argued that the Dewey-Burdock site contains numerous geological and man-made features that will permit groundwater migration.[216] Overall, the Board resolved this contention in favor of Powertech and the Staff.[217] The Board carefully and extensively considered evidence presented by all four parties, and it concluded that the Staff had taken the required hard look at the confinement of the overall ore zone.[218] Because of the numerous issues covered by this contention, the Board explained its ruling on each specific technical issue related to fluid containment separately.[219]

In its ruling on Contention 3, the Board conditioned Powertech's license as follows:

> Prior to conducting tests for a wellfield data package, the licensee will attempt to locate and properly abandon all historic drill holes located within the perimeter well ring for the wellfield. The licensee will document, and provide to the NRC, such efforts to identify and properly abandon all drill holes in the wellfield data package.[220]

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[215] The Tribe also argues that the Board abused its discretion in disregarding the Tribe's argument that Regulatory Guide 4.14 is outdated. *Id.* at 20-21. The Tribe's dissatisfaction with Regulatory Guide 4.14 does not demonstrate Board error presenting a substantial question for our review, particularly since, as the Staff points out, the Regulatory Guide did not form a basis for the Board's decision. *See* LBP-15-16, 81 NRC at 665-66; *see also* Staff's Response to Tribe at 17-18.

[216] *See* Tribe's Post-Hearing Brief at 43-56.

[217] LBP-15-16, 81 NRC at 681.

[218] *Id.* at 676.

[219] *See id.* at 676-81.

[220] *Id.* at 679, 709.

The Board explained that it conditioned the license because "despite the NRC Staff's claim that 'because there are a number of improperly plugged or abandoned boreholes at the Dewey-Burdock site, as a condition of its license Powertech must address these boreholes before beginning operations,' [the Board] did not find any such explicit condition in the license."[221] It concluded that with the additional license condition, the FSEIS and the record contain "adequate hydrogeological information to demonstrate the ability to contain fluid migration and assess potential impacts to groundwater."[222]

b. Petitions for Review

Both the Tribe and Consolidated Intervenors have petitioned for review of the Board's ruling on this contention.[223] Additionally, Powertech has petitioned for review of the license condition the Board imposed as part of its ruling.[224] As explained below, none of the petitions for review regarding this contention raise a substantial question.

(1) THE TRIBE'S PETITION FOR REVIEW

Although the Tribe characterizes its challenges to the Board's ruling on Contention 3 as legal arguments, the arguments generally relate to how the Board weighed the evidence.[225] With respect to those challenges, based upon our review of the record, we find that none of the Tribe's arguments demonstrate a substantial question for review regarding the Board's factual findings.

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[221] *Id.* at 679 (quoting *NRC Staff's Reply Brief* (Jan. 29, 2015), at 26).

[222] *Id.* at 681.

[223] Tribe's Petition at 22-23; Consolidated Intervenors' Petition at 2 & n.3, 4-7.

[224] Powertech's Petition at 22-25.

[225] *See* Tribe's Petition at 22.

The Tribe argues that the Board committed legal error in holding that, while "small faults and joints may be present in the project area, their presence does not support Intervenors' assertions [regarding the impacts of the faults and joints.]"[226] The Tribe asserts that the Board "appl[ied] an inappropriate legal standard when it effectively placed the burden on the Tribe to demonstrate the impacts associated with these faults and fractures."[227] We disagree—the Board has neither shifted the burden of proof nor applied an inappropriate legal standard. In its ruling, the Board made clear that "[t]his is not simply a question of whether faults and joints are present, but rather whether they are large and open enough to produce a substantial breach in the confining layers …."[228] The Board carefully weighed the evidence and made a factual finding that the faults and joints would not provide pathways for groundwater migration.[229] We defer to the Board's findings with respect to the underlying facts unless they are "clearly erroneous."[230] Here, the Tribe has not raised a substantial question of clear error on the part of the Board.

Next, the Tribe objects to the Board's imposition of a license condition requiring Powertech to attempt to locate and abandon boreholes.[231] The Tribe characterizes the license condition imposed by the Board as the sole means of achieving compliance and preventing leakage.[232] We disagree. In addition to the license condition imposed by the Board, License Condition 11.5 requires Powertech to monitor for excursions and take corrective action—

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[226] LBP-15-16, 81 NRC at 678.

[227] Tribe's Petition at 23.

[228] LBP-15-16, 81 NRC at 677.

[229] *Id.* at 671-73; 677-78.

[230] *Honeywell*, CLI-13-1, 77 NRC at 18-19; *Geisen*, CLI-10-23, 72 NRC at 224-25.

[231] Tribe's Petition at 22-23.

[232] *Id.* at 22.

including potentially terminating injection of lixiviant within the wellfield until the excursion is corrected.[233] This requirement provides incentive for Powertech to locate and abandon the boreholes. Moreover, the Board's additional license condition requires Powertech to "document its efforts" to find and fill the boreholes, enabling the Staff to assess whether Powertech's efforts are undertaken in good faith.[234] Additionally, absent evidence to the contrary, we assume at the licensing stage that a licensee will comply with its obligations.[235]

The Tribe argues that the Board "relie[d] entirely" on a license condition outside the NEPA process.[236] But the Tribe's assertion is inaccurate. As explained above, the Board relied on much more than one license condition; it weighed all parties' evidence and testimony on this contention, along with the information in the FSEIS and the record.[237] We see no clear error in the Board's reasonable conclusion that the additional license condition will ensure Powertech's compliance with the requirement to attempt to find and plug historic boreholes. Accordingly, we deny the Tribe's petition for review with respect to Contention 3.

(2) CONSOLIDATED INTERVENORS' PETITION FOR REVIEW

Like the Tribe, Consolidated Intervenors challenge the Board's weighing of the evidence in its ruling on Contention 3. Consolidated Intervenors argue that the Board shifted the burden of proof and instituted "a new 'compelling' standard"; they refer to the Board's findings with

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[233] Ex. NRC-012, License, at 10-11.

[234] LBP-15-16, 81 NRC at 679, 709.

[235] *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 400 (1995); *cf. Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003).

[236] Tribe's Petition at 22.

[237] LBP-15-16, 81 NRC at 676-81; Ex. NRC-008-A-2, FSEIS § 4.5.2.1.1.2.2.

respect to whether leakage was caused by unplugged boreholes or by naturally occurring fissures and joints.[238]

Contrary to Consolidated Intervenors' argument, the Board's decision contains careful consideration of the parties' evidence regarding several subjects in dispute.[239] The Board neither shifted the burden of proof nor created a new standard of proof. It appropriately weighed the evidence presented by the parties and made factual determinations based on that evidence.[240]

Additionally, Consolidated Intervenors argue that the Board erred when it accepted a witness's "unsubstantiated opinion," and they argue generally that the Board committed factual error regarding leakage at the site.[241] Consolidated Intervenors argue that the Board should not have credited an expert witness proffered by Powertech because that witness was "speaking from the perspective of the mining industry" rather than in the interest of public health and safety.[242] The witness the Board cited is an experienced engineer and hydrologist.[243] Consolidated Intervenors have raised no objection to his qualifications aside from the fact that he testified for the applicant. Our deference to the Board is particularly great when it comes to weighing the credibility of witnesses.[244] Our review of the record demonstrates that the Board examined the exhibits, questioned witnesses, and considered the parties' pleadings and

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[238] Consolidated Intervenors' Petition at 2 & n.3, 4, 6-7; *see* LBP-15-16, 81 NRC at 677.

[239] LBP-15-16, 81 NRC at 676-81.

[240] *Id.*

[241] Consolidated Intervenors' Petition at 2 & n.3, 4-6.

[242] *Id.* at 5.

[243] *See* Ex. APP-014, Curriculum Vitae of Hal. P. Demuth, M.S., Petrotek Engineering Corporation (ML14240A422).

[244] *See, e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003) (citations omitted).

statements of position in making its decision.[245] Because Consolidated Intervenors have not raised a substantial question regarding the Board's findings of fact, we deny their petition with respect to this contention.

(3) POWERTECH'S PETITION FOR REVIEW

Powertech seeks review of the Board's imposition of an additional license condition regarding location and abandonment of historic boreholes. It argues that the Board's addition of this license condition constituted clear error of fact because Powertech had already committed to plugging historic boreholes.[246] We find that any factual error in the Board's determination that the license did not contain an explicit condition regarding historic boreholes was harmless. While Powertech is bound by License Condition 9.2 to its commitment to plug boreholes, we do not see the inherent conflict between that commitment and the Board's additional license condition that Powertech and the Staff assert exists. The Board's general license condition can be implemented through the more specific procedures contained in Powertech's commitment. We also see little in the way of additional burden here, particularly if, as Powertech asserts, the Dewey-Burdock site's artesian conditions make it easier to identify improperly plugged boreholes, and it has documentation that historical boreholes were plugged according to State regulations.[247]

Next, Powertech asserts that the Board committed factual and legal error in imposing the license condition *sua sponte*.[248] Powertech argues that because "[n]one of the argument or testimony pertained to plugging and abandoning *all* boreholes prior to the commencement of

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[245] *See, e.g.*, LBP-15-16, 81 NRC at 667-81.

[246] Powertech's Petition at 22-23.

[247] *Id.* at 25 n.57.

[248] *Id.* at 23-25.

licensed operations in a given wellfield," the Board imposed the license condition *sua sponte*.[249] But as the record reflects, historical boreholes were one of the issues raised in Contention 3; the Board imposed this license condition in ruling on that contention, which was the subject of a full evidentiary hearing.[250] Moreover, as the Staff points out in its response to Powertech's petition, "[the Tribe's and Consolidated Intervenors'] arguments could reasonably be construed as claiming that, in order to ensure adequate containment, Powertech must properly abandon all boreholes within the perimeter of each wellfield."[251] The Board ruled on a matter properly before it in imposing an additional license condition on Powertech. Powertech's argument that the license condition was imposed *sua sponte* does not raise a substantial question for review. We deny review of Powertech's petition regarding Contention 3.

4. Contention 6

In Contention 6, the Tribe argued that discussion of mitigation measures in the FSEIS was inadequate for two reasons. First, the Tribe asserted that the FSEIS's discussion and evaluation of mitigation measures was insufficiently detailed.[252] Second, it argued that the Staff erroneously deferred development of further mitigation measures until after the issuance of the FSEIS and the Record of Decision.[253] In its petition, the Tribe challenges the Board's ruling by asserting that the Board failed to address several of its arguments and that the Board's ruling on Contention 6 is inconsistent with its ruling on Contention 1A.

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[249] *Id.* at 24.

[250] *See* LBP-15-16, 81 NRC at 674-75, 679.

[251] *NRC Staff's Response to Powertech's Petition for Review of LBP-15-16* (June 22, 2015), at 7 n.16.

[252] *Oglala Sioux Tribe's Statement of Position on Contentions* (June 20, 2014), at 27-28 (Tribe's Statement of Position). Consolidated Intervenors adopted the Tribe's arguments with respect to Contention 6. *Consolidated Intervenors' Opening Statement* (July 7, 2014), at 9.

[253] Tribe's Statement of Position at 28.

a. Contention and Board Order

With respect to the portion of its contention that challenged the discussion of mitigation measures in the FSEIS, the Tribe argued before the Board that NEPA requires an EIS to "detail[] with [a] specific description, supporting data, and analysis of process and effectiveness" each mitigation measure.[254] The Tribe asserted that the Dewey-Burdock project FSEIS merely listed potential mitigation measures and lacked scientific evidence or analysis regarding the effectiveness of each measure.[255]

The Board, after a merits hearing and review of the record, determined that the Staff's discussion and evaluation of mitigation measures was sufficient.[256] The Board agreed with the Tribe's arguments regarding NEPA's requirements for analysis of mitigation measures, but it found that the Staff had met those requirements.[257] In its holding, the Board determined that the Tribe completely overlooked Chapter 4 of the FSEIS, which contained extensive analysis of mitigation measures.[258] Further, the Board stated that the FSEIS "fully evaluated the impacts and mitigation strategies detailed under other [expert agency] permits."[259] Finally, the Board concluded that Powertech's license requires compliance with mitigation and monitoring measures described in the FSEIS, the Record of Decision, and the license.[260] Accordingly, the

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[254] *Id.* at 38.

[255] *Id.* at 30-32.

[256] LBP-15-16, 81 NRC at 690-91.

[257] *Id.* at 690.

[258] *Id.* at 690-91.

[259] *Id.* at 692.

[260] *Id.* at 691.

Board found that Powertech would be required to comply with mitigation strategies analyzed in the FSEIS from initial, pre-licensing activities through decommissioning.[261]

In the second portion of Contention 6, the Tribe argued that the Staff violated NEPA by deferring development of certain mitigation measures—particularly mitigation of adverse effects on cultural resources—until after issuance of the FSEIS.[262] The Tribe also challenged the Staff's analysis of the proposed monitoring well network, historical well hole plugging, and wildlife protections and monitoring.[263]

Regarding the development of mitigation measures after FSEIS completion, the Board ruled that "[t]he release of an FSEIS does not mark the completion of the NEPA review process."[264] The Board noted that the FSEIS referenced the yet-to-be-issued Programmatic Agreement and explained that mitigation measures adopted in the Programmatic Agreement could mitigate impacts on historic or cultural resources.[265] Further, the Board determined that the FSEIS included analysis of certain mitigation measures to be implemented post-licensing.

In finding the FSEIS's analysis adequate, the Board relied upon the generally accepted presumption that Powertech will comply with its obligations as listed in the license, the FSEIS, and associated documents.[266] The Board noted that monitoring programs are "a principal aid" to the Staff and the licensee in determining whether mitigation measures are effective.[267] Moreover, it stated that several of Powertech's license conditions require Powertech to

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[261] *Id.*

[262] Tribe's Statement of Position at 28.

[263] *Id.* at 33-34.

[264] LBP-15-16, 81 NRC at 694.

[265] *Id.*

[266] *Id.* at 695.

[267] *Id.*

document, maintain, and submit to NRC its monitoring results.[268] In sum, the Board held that the mitigation and monitoring plans in the FSEIS, while not final, complied with NEPA.[269] Accordingly, the Board resolved Contention 6 in favor of Powertech and the Staff.

b. The Tribe's Petition for Review

On appeal, the Tribe argues that it had identified significant analytical gaps in the agency's review of mitigation measures, and that the Board failed to address all of its arguments when ruling on Contention 6.[270] We disagree. The Board, after a careful examination of the record, determined that the FSEIS contained sufficient analysis of mitigation measures.[271] Absent clear error, which the Tribe has not demonstrated, we decline to disturb the Board's determination that the FSEIS's analysis of mitigation measures was sufficient for NEPA compliance. Therefore, we deny the Tribe's petition with respect to this point.

The Tribe also seeks review of the Board's decision regarding deferral of development of mitigation measures and argues that the Board erred at law and abused its discretion.[272] For the reasons stated below, we deny the Tribe's petition for review with respect to this issue.

First, the Tribe argues that future development of mitigation measures through the Programmatic Agreement violated NEPA.[273] The Tribe asserts that the Board's ruling disregarded the Tribe's claim that the Programmatic Agreement failed to include "any actual

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[268] *Id.* at 695-97.

[269] *Id.* at 694 (quoting *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006)).

[270] Tribe's Petition at 24 (citing LBP-15-16, 81 NRC at 689).

[271] LBP-15-16, 81 NRC at 690-92.

[272] Tribe's Petition at 24.

[273] *Id.*

mitigation [measures]," in violation of NEPA.[274] We disagree with the Tribe's argument regarding lack of analysis in the Programmatic Agreement. Our examination of the record reveals that the Programmatic Agreement and the FSEIS contain discussion of mitigation measures for cultural resources, and the Board did not find deficiencies in those discussions.[275] Because the Tribe fails to address these discussions, it does not raise a substantial question for review of the Board's finding that they are adequate for NEPA compliance.

Next, the Tribe challenges the Board's ruling regarding the FSEIS's discussion of mitigation measures in numerous areas, including wildlife protection, wellfield testing, air impacts, and historical well hole plugging and abandonment.[276] It argues that "the [Board's] ruling also substantially ignore[d] the Tribe's arguments regarding other mitigation issues," which, in the Tribe's view, the Staff did not sufficiently describe or analyze in the FSEIS.[277]

We disagree. In ruling on these points, the Board did not disregard the Tribe's arguments; it determined—based on precedent and its review of the record—that the mitigation and monitoring plans discussed in the FSEIS and Programmatic Agreement contained the level

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[274] *Id.*

[275] *See, e.g.*, Ex. NRC-018-A, "Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties, South Dakota" (Mar. 3, 2014), at 5 (requiring Powertech to protect all unevaluated properties until National Register-eligibility determinations are completed), at 10 (requiring Powertech to halt ground-disturbing activities within a 150-foot area and take numerous additional steps if a previously unknown cultural resource is discovered during the implementation of the Dewey-Burdock Project) (ML14246A401) (Programmatic Agreement); Ex. NRC-008-A-2, FSEIS § 4.9.1.1.1. The Staff's mitigation recommendations appear in the far-right columns of Tables 4.9-1 through 4.9-6.

[276] Tribe's Petition at 25.

[277] *Id.*

of detail required by NEPA.[278] The Tribe's petition does not articulate a substantial question for review with respect to this portion of the Board's decision.

Finally, the Tribe asserts that the Board's ruling with respect to Contention 6 is "internally inconsistent" because it conflicts with the Board's ruling on Contention 1A where it found, in part, that the Staff's analysis of mitigation measures for cultural resources did not satisfy NEPA.[279] The Board found generally that the Staff's analysis of mitigation was sufficient. Specifically regarding mitigation of cultural resources, the Board ruled that

> [t]he FSEIS … explains that mitigation measures adopted in the Programmatic Agreement "could reduce an adverse impact to a historic or cultural resource." … Therefore, the Board finds that the NRC Staff completing the Programmatic Agreement after the FSEIS was released, but before the issuance of the Record of Decision or the license, adequately satisfied NEPA.[280]

Regarding Contention 6, the Board concluded that the Staff's analysis of mitigation measures for cultural resources fulfilled NEPA's requirements. We agree with the parties, however, that this statement is inconsistent with the Board's ruling on Contention 1A. Specifically, there the Board stated that "the FSEIS does not include mitigation measures sufficient to protect [the Tribe's] cultural, historical, and religious sites that may be affected by the Powertech project."[281] With this statement, the Board appears to be mixing the requirements of NEPA and the NHPA—NEPA does not require the adoption of mitigation measures, only a discussion of their potential effects. Regardless, by pointing out these inconsistent Board statements, the Tribe has demonstrated only harmless error because the mitigation measures for cultural resources are covered by Contentions 1A and 1B. Thus, a separate ruling on this specific issue under

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[278] LBP-15-16, 81 NRC at 694-95.

[279] Tribe's Petition at 25; *see* LBP-15-16, 81 NRC at 655.

[280] LBP-15-16, 81 NRC at 694.

[281] *Id.* at 655.

Contention 6 is not necessary. Therefore, we find that the Tribe does not raise a substantial question for our review with respect to Contention 6.

III. CONCLUSION

For the foregoing reasons, we *deny* in part each party's petition for review. We *grant* each party's petition with respect to the finality of the Board's ruling on Contentions 1A and 1B and find that these contentions should be considered "final" for the purposes of the petitions for review at issue here. We *grant* the Staff's and Powertech's petitions for review with respect to the Board's direction to the Staff regarding the resolution of Contentions 1A and 1B. Pursuant to our inherent supervisory authority over agency adjudications, we *direct* that the proceeding remain open for the narrow purpose of resolving the deficiencies identified by the Board in Contentions 1A and 1B and *affirm* the Board's direction to the Staff to submit monthly status reports and the Board's direction to file an agreement between the parties or a motion for summary disposition to resolve the deficiencies identified by the Board. We *grant* the Tribe's petition for review with respect to proposed Contention 8 and dismiss that contention.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of December, 2016

Commissioner Svinicki, dissenting in part.

I fully join the majority's order today with one exception: the Staff's and Powertech's appeals of Contentions 1A and 1B. For the reasons expressed below, I would take review of these petitions because the Board applied the wrong legal standards to these contentions. Moreover, when considered under the correct legal standards, the evidentiary record supports resolving Contentions 1A and 1B in favor of the Staff. Therefore, I would enter judgment in favor of the Staff and direct the Board to terminate this proceeding.

A. Contention 1A

On appeal, the Staff argues that the Board's ruling on Contention 1A constitutes legal error because it misapplied NEPA's hard look standard, under which the Board should assess whether the Staff "made reasonable efforts" to obtain adequate information on the cultural resources at issue here.[1] In its brief, the Staff describes the efforts it undertook and argues that these efforts were sufficient to meet the hard look standard.[2] The Staff asks us to view the Board's application of the hard look standard as a legal issue under 10 C.F.R. § 2.341(b)(4)(ii).[3] I would take review of the Staff's petition for review of Contention 1A and reverse the Board's ruling that the Staff's environmental analysis did not adequately address the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources.

We have previously acknowledged that for some NEPA reviews, necessary data may "prove to be unavailable, unreliable, inapplicable, or simply not adaptable."[4] In such cases, we

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[1] Staff's Petition at 17-18.

[2] *Id.* at 19-20.

[3] *Id.* at 17.

[4] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010).

have directed the Staff to provide a reasonable analysis of the available information with a "disclosure of incomplete or unavailable information."[5] Likewise, Federal courts have upheld agency determinations not to analyze impacts "for which there are not yet standard methods of measurement or analysis."[6] Moreover, the NRC looks for guidance to the Council on Environmental Quality's implementing regulations for NEPA, which specify that an agency need not include relevant information if "the overall costs of obtaining it are exorbitant."[7]

While the Board cited to these principles in its discussion of legal standards, it did not apply these rules to the FSEIS.[8] Instead of responding to the Staff's argument that "it complied with NEPA by making repeated attempts to obtain information on cultural resources,"[9] the Board examined whether the FSEIS "adequately catalogued" the "cultural, historical, and religious sites of the Oglala Sioux Tribe."[10] Because it found that the FSEIS did not contain this information, the Board concluded that the "NRC Staff did not give this issue its required hard look in the FSEIS."[11] Consequently, the Staff is correct that the Board's ruling on Contention 1A constitutes legal error. Instead of considering whether the Staff could reasonably obtain the information it acknowledged was missing, the Board invalidated the FSEIS simply because the

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[5] *Id.*

[6] *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 13 (1st Cir. 2008).

[7] 40 C.F.R. § 1502.22; *see also Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011) (observing that while the NRC is not bound by CEQ regulations, it looks to them for guidance).

[8] LBP-15-16, 81 NRC at 638 (noting that "an environmental impact statement is not intended to be a research document" (internal quotation marks omitted)).

[9] *Id.* at 652.

[10] *Id.* at 655.

[11] *Id.*

information was missing in the first place.[12] This approach is facially inconsistent with our precedent, Federal case law, and the CEQ regulations, which recognize that in some instances information relevant to an EIS will not be reasonably available and direct the agency to proceed in accord with NEPA's rule of reason in the face of such lacunae.[13] Therefore, the Board's ruling on Contention 1A rests on a legal error.[14]

While the Commission would normally hesitate to wade through such a detailed factual record ourselves, particularly when we have not had the advantage of observing testimony first hand,[15] in this case other findings from the Board indicate that the missing information was not reasonably available. Specifically, upon reviewing the record in its entirety, the Board concluded that the amount of "funds requested to collect tribal cultural information" by the Oglala Sioux was "patently unreasonable."[16] If information is only available at a patently unreasonable cost, here potentially four million dollars to conduct one part of the cultural survey (itself only one part of the larger NEPA review), it follows that such information is not reasonably available.[17] Moreover, because this information missing from the FSEIS was not reasonably available, its absence from the FSEIS analysis cannot be a basis upon which the FSEIS fails to meet NEPA's hard look standard.

In its Response, the Tribe argues that the precedents cited by Staff do not stand for the legal principle that when relevant information to an EIS is unavailable, the agency must only

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[12] *Id.*

[13] *Pilgrim*, CLI-10-22, 72 NRC at 208; *Town of Winthrop*, 535 F.3d at 13; 40 C.F.R. § 1502.22.

[14] 10 C.F.R. § 2.341(b)(4)(ii).

[15] *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975) (noting that "Licensing Boards are the Commission's primary fact finding tribunals").

[16] LBP-15-16, 81 NRC at 657 & n.229.

[17] Staff's Petition at 6 (citing Tr. at 804, 807).

make reasonable efforts to obtain the information.[18] Specifically, the Tribe argues that many of the cases relied on by the Staff only hold that agencies need not consider remote and speculative impacts in an EIS.[19] But, it appears that the Staff only cited to these precedents to establish NEPA's general rule of reason.[20] Moreover, several of the authorities relied on by the Staff appear to support the position that agencies need only undertake reasonable efforts to acquire missing information, such as 40 C.F.R. § 1502.22, *Town of Winthrop*, and *Pilgrim*.[21] For the most part, the Tribe did not discuss these authorities in its response.[22] While the Tribe asserts that *Pilgrim* "simply confirmed" that an EIS is "not intended to be a research document,"[23] these quotations from *Pilgrim* support the Staff's position because they indicate that an agency need not take extraordinary efforts to obtain or create missing information.

B. Contention 1B

Powertech advances a similar argument with respect to Contention 1B — that the Board did not apply the correct standard for tribal consultation under the NHPA implementing regulations.[24] I would take review of Powertech's petition with respect to Contention 1B and

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[18] Tribe's Response at 15-17.

[19] *Id.* (citing *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287 (2010)).

[20] Staff's Petition at 17-18.

[21] *Id.* (citing *Pilgrim*, CLI-10-22, 72 NRC at 208; *Town of Winthrop*, 535 F.3d at 13; 40 C.F.R. § 1502.22).

[22] Tribe's Response at 16.

[23] *Id.* (quotation marks omitted).

[24] *See* Powertech's Petition at 9-11 ("T]he Licensing Board's attempt to distinguish between the characterizations of consultation as 'reasonable' versus 'meaningful' is not part of the NHPA statutory framework or regulatory regime.").

reverse the Board's ruling that the consultation process between the Staff and the Tribe was inadequate.

Under the NHPA's implementing regulations, the NRC must provide every tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its view on the undertaking's effects on such properties, and participate in the resolution of such adverse effects."[25] While the "Tribe is entitled to 'identify its concerns,' to 'advise,' to 'articulate,' and to 'participate,'" courts have warned that "consultation is not the same thing as control over a project."[26] Even if a party's involvement is limited, if that limited involvement is by choice, the agency has provided the party with a reasonable opportunity to participate.[27]

With regard to Contention 1B, the Board initially stated the correct legal standard, whether the Staff provided a "reasonable opportunity" for consultation.[28] However, in evaluating Contention 1B, rather than apply that standard, the Board sought to determine "which party or specific action led to the impasse preventing an adequate tribal cultural survey."[29] Ultimately, the Board determined that the "NRC Staff is at least partly at fault for the failed consultation process" largely because it never "held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe."[30] Likewise, the Board

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[25] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[26] *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 168 (1st Cir. 2003).

[27] *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1009 (9th Cir. 2013).

[28] LBP-15-16, 81 NRC at 639 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)).

[29] *Id.* at 656.

[30] *Id.* And the Tribe's status as a litigant in this proceeding does not alter its role as a consulting party. To be sure, the ACHP's regulations list various consulting parties, including both Indian tribes and "[c]ertain individuals and organizations with a demonstrated interest in the

concluded that the "Oglala Sioux Tribe does share some responsibility for the ... lack of meaningful consultation."[31] Therefore, because the Board focused its attention on apportioning culpability for what became an impasse, instead of determining whether the opportunity for consultation itself was a reasonable one, the Board's decision constituted legal error.[32]

As noted above, the Commission generally hesitates to make factual findings in the first instance, but again the record developed by the Board is sufficient to answer the question posed: here, whether the Staff provided a reasonable opportunity for consultation. One of the most striking aspects of this record is that the ACHP, the agency expert in implementing the NHPA, signed the NRC's Programmatic Agreement for the Dewey-Burdock project, and in so doing, found that it set forth a phased process for compliance with section 106.[33] While the ACHP's agreement is not binding on the Commission, its findings are entitled to considerable

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undertaking … due to their legal or economic relation to the undertaking or affected properties." *See* 36 C.F.R. § 800.2(c)(2) and (5). But the Board's implication that the Tribe's status as an intervenor somehow elevates its status as a consulting party is incorrect. *See* LBP-15-16, 81 NRC at 656.

[31] LBP-15-16, 81 NRC at 656.

[32] 10 C.F.R. § 2.341(b)(4)(ii).

[33] Ex. NRC-018-D, Letter from Charlene Dwin Vaughn, Advisory Council on Historic Preservation, to Kevin Hsueh, NRC (Apr. 7, 2014) (ML14246A405); *see* Ex. NRC-18-E, Advisory Council on Historic Preservation Signature Page of Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties South Dakota (Apr. 7, 2014) (ML14246A417); *see also* Ex. NRC-018-A, Programmatic Agreement, at 2; Ex. NRC-018-B, Appendices Related to the Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock [*In Situ*] Recovery Project Located in Custer and Fall River Counties South Dakota, app. A, at 2-7 (ML14246A406); 36 C.F.R. § 800.4(b)(2).51-52.

weight.[34] On balance, the record demonstrates that the Staff has committed to phased compliance with section 106, as endorsed by the ACHP. I fully expect the Staff to satisfy its obligations under the Programmatic Agreement, which include consultation. Accordingly, I would conclude that the Staff has provided the Tribe with a reasonable opportunity to consult and will continue to take appropriate actions under the Programmatic Agreement.

In its Response, the Tribe argues that the factual record contains sufficient information to rebut the Staff's and Powertech's efforts to "blame the Tribe for the problems with NRC Staff's NHPA compliance."[35] But, as noted above, the correct standard is not whether there is sufficient evidence to apportion blame, but whether the opportunity to consult was reasonable. While the Tribe may well be disappointed with how the consultation unfolded, courts have consistently held that "a reasonable opportunity to consult" does not guarantee any specific results.[36] Consequently, this argument is not persuasive.

Next, the Tribe argues that Federal case law supports the reasonableness of the Board's holding.[37] But, it appears that these cases involve very different factual backgrounds.[38] Indeed,

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[34] *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977).

[35] Tribe's Response at 19.

[36] *Narragansett Indian Tribe*, 334 F.3d at 168. While some courts have determined that agency shortcomings, such as misrepresenting important facts or only relying on written communications, may render an opportunity to consult unreasonable, *Pueblo of Sandia v. United States*, 50 F.3d 856. 860-62 (10th Cir. 1995), on balance the record does not support such findings here.

[37] Tribe's Response at 19-21 (citing *Quechan Indian Tribe of Fort Yuma Indian Reservation v. Dep't of the Interior*, 755 F. Supp. 2d 1104 (D. Ariz. 2008); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990); *Slockish v. U.S. Federal Highway Admin.*, 682 F. Supp. 2d 1178 (D. Or. 2010); *Pueblo of Sandia*, 50 F.3d at 856).

[38] *Quechan Tribe*, 755 F. Supp. 2d at 1119 (noting that the Tribe was not provided with adequate information or time); *Slockish*, 682 F. Supp. 2d at 1197 (stating that in deciding whether the NHPA claim was moot, the court "must begin by assuming ... that the defendants have violated the NHPA").

the Tribe concedes that many of the cases have distinguishing characteristics from the instant case.[39] Finally, some aspects of these cases appear to be unfavorable to the Tribe's position; for example one district court noted, "None of this analysis is meant to suggest federal agencies must acquiesce to every tribal request."[40] Consequently, I am not persuaded by the Tribe's efforts to rehabilitate the Board's legal analysis.

Therefore, because the Board applied the incorrect legal standards to Contentions 1A and 1B, I would overturn the Board's determinations with respect to those two contentions and find (1) that the Staff's NEPA analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources was adequate and (2) the Staff has provided the Tribe with a reasonable opportunity to consult under the NHPA. Consequently, I would find in favor of the Staff on these two contentions and direct the Board to terminate this proceeding.

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[39] Tribe's Response at 21-22 (observing that *Attakai* and *Pueblo of Sandia* involved cases in which the agency wholly failed to consult with an affected Tribe).

[40] *Quechan Tribe*, 755 F. Supp. 2d at 1119.

Commissioner Baran, dissenting in part.

I join in the Commission's decision except for the portion of the decision that denies review of the Tribe's claim that the Board erred by not vacating the license for failure to complete an adequate NEPA review. I respectfully dissent on this issue.

As I stated in my partial dissent in the *Strata* proceeding and my dissent in the *Turkey Point* proceeding, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[1] If the Commission allows a Board to supplement and cure an inadequate NEPA document *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

In this case, the Board found that the Staff's FSEIS did not meet the requirements of NEPA because the FSEIS was deficient with respect to the effects of the licensing action on Native American cultural, religious, and historic resources.[2] Thus, the agency did not have an adequate environmental analysis at the time it decided whether to issue the license. In fact, the deficiencies in the NEPA analysis remain unaddressed today, and therefore the Staff still cannot make an adequately informed decision on whether to issue the license. The Staff's licensing decision was based on (and continues to rest on) an inadequate environmental review. As a result, the Staff has not complied with NEPA.

The Commission should suspend the license until the Staff has, in accordance with the Board's order, filed its final monthly status report demonstrating that the FSEIS complies with

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[1] *Strata*, CLI-16-13, 83 NRC at 604 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)), *appeal docketed*, No. 16-1298 (D.C. Cir. Aug. 24, 2016); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-16-18, 84 NRC __ (Dec. 15, 2016) (slip op.).

[2] LBP-15-16, 81 NRC at 708, 655-58. The Board also identified a NEPA deficiency with respect to hydrogeological information, the subject of Contention 3, and conditioned Powertech's license to cure this deficiency. *See id.* at 679, 681, 709.

NEPA and our regulations. Once the Staff had satisfied the Board's order and completed an adequate NEPA analysis on which to base its decision, the Staff would then be in a position to decide whether to modify, reinstate, condition, or revoke the license.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-20)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
COMMISSION MEMORANDUM AND ORDER (CLI-16-20)

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 23RD day of December, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1059 **September Term, 2017**
FILED ON: JULY 20, 2018

OGLALA SIOUX TRIBE,
PETITIONER

v.

U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

POWERTECH (USA), INC.,
INTERVENOR

On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

Before: GARLAND, *Chief Judge*, and HENDERSON and GRIFFITH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the petition for review of an order of the United States Nuclear Regulatory Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review be dismissed in part for lack of jurisdiction, be granted in part, and the case be remanded to the Commission for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 20, 2018

Opinion for the court filed by Chief Judge Garland.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1059 **September Term, 2018**

NRC-040-09075-MLA

Filed On: September 13, 2018 [1750346]

Oglala Sioux Tribe,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Powertech (USA), Inc.,
Intervenor

MANDATE

In accordance with the judgment of July 20, 2018, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Link to the judgment filed July 20, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns
Annie Caputo
David A. Wright

In the Matter of POWERTECH (USA) INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-18-07

MEMORANDUM AND ORDER

Powertech (USA) Inc. (Powertech) petitions for review of the Atomic Safety and Licensing Board's decision denying in part and granting in part the Staff's motion for summary disposition of Contentions 1A and 1B challenging the issuance of an *in situ* uranium recovery license to Powertech.[1] Powertech requests that we reverse the Board's partial denial of summary disposition and direct the Staff to supplement the Final Supplemental Environmental Impact Statement (FSEIS), thereby ending this proceeding.[2] For the reasons described below, we deny Powertech's petition for review.

[1] *Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-17-09* (Nov. 13, 2017) (Petition); *see also* LBP-17-9, 86 NRC 167 (2017).

[2] Petition at 1-2, 16, 20.

I. BACKGROUND

This proceeding has been pending since 2009, when Powertech first applied for a license for the Dewey-Burdock *In Situ* Uranium Recovery Facility. The Oglala Sioux Tribe ("Tribe") and Consolidated Intervenors (together, "Intervenors") were admitted as intervenors in 2010.[3] The Staff issued the FSEIS in January 2014 and issued the license to Powertech in April 2014, while Intervenors' admitted contentions were still pending before the Board.[4] The Board held an evidentiary hearing on the Intervenors' contentions in August 2014.

In April 2015, the Board issued a partial initial decision finding in favor of the Staff and Powertech on all contentions except Contentions 1A and 1B, both of which concerned the Staff's consideration of the potential impacts of the proposed project on Native American cultural resources at the project site.[5] Specifically, the Board found "that the FSEIS [had] not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic, resources" (Contention 1A) and "that the consultation process between the NRC Staff and the Oglala Sioux Tribe was inadequate" (Contention 1B).[6] Despite these findings, the Board did not determine that suspension of the license was warranted.[7] Instead, it found that the Staff should work to remedy the two identified

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[3] LBP-10-16, 72 NRC 361, 376 (2010).

[4] *See* Exs. NRC-008-A-1 to NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014) (ADAMS Accession Nos. ML14246A350, ML14246A329, ML14246A330, ML14246A331) (FSEIS); Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408) (License).

[5] LBP-15-16, 81 NRC 618 (2015).

[6] *Id.* at 655, 657.

[7] *See id.* at 657-58.

deficiencies, report to the Board on its progress, and eventually resolve the contention with a settlement agreement, or if not able to reach a settlement, with a motion for summary disposition.[8]

All parties appealed the Board's various rulings in LBP-15-16 (as well as various interlocutory rulings), but we affirmed the Board in all respects relevant to this appeal.[9] We specifically rejected Powertech's argument that the Staff had already considered all information pertaining to cultural resources that was reasonably available and had therefore satisfied the National Environmental Policy Act (NEPA) as a matter of law.[10] Instead, we found that "Powertech's dispute with the Board's decision [was] factual, not legal" and, in the absence of clear error, deferred to the Board's factual determinations concerning the adequacy of the FSEIS.[11]

Over the course of the following two years, the Staff made several attempts to adequately consult with the Tribe, including correspondence and email, one face-to-face meeting, and a January 31, 2017, teleconference.[12] However, during this period, the Tribe and

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[8] *Id*. at 710.

[9] *See* CLI-16-20, 84 NRC 219, 262 (2016). We affirmed the Board's decisions on the merits but we disagreed with the characterization that its ruling with respect to Contentions 1A and 1B rendered the decision non-final. We explained that the Board's decision was final and appealable, although we ultimately approved the Board's approach in retaining jurisdiction over the matter until the deficiencies identified in the FSEIS were resolved. *See id*. at 242-43, 250-51.

[10] *See Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-15-16*, at 20-22 (May 26, 2015).

[11] CLI-16-20, 84 NRC at 247. The Tribe has filed a petition for review of CLI-16-20 in the United States Court of Appeals for the District of Columbia. *Oglala Sioux Tribe v. NRC* (D.C. Cir. No. 17-1059). On July 20, 2018, the court issued a decision remanding the case for further proceedings concerning the status of the license in light of the NEPA deficiency that has been identified.

[12] *See NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017) (Staff Motion), attach. 1, *NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017); *id*., attach. 2, *Affidavit of Kellee*

the Staff could not agree upon a method to survey cultural, historic, and religious resources at the site or assess the possible impact of the project on such resources.[13] During the January 2017 teleconference, the Staff proposed an "open-site" survey method that would involve representatives of the Tribe walking over the site for a period of time in exchange for mileage reimbursement, a per diem, and an honorarium of $10,000.[14] The open site survey proposal would have been similar to a survey performed in 2013 in which the Tribe declined to participate.[15] According to the Staff's summary of the teleconference, the Tribe did not accept this proposal and instead "expressed its preference to develop a survey methodology similar in nature to the Makoche Wowapi survey proposal that was submitted to the NRC in 2012."[16] As a result of the parties' failure to reach an agreement on the survey methodology, no additional information about cultural resources at the site was able to be gathered from the Tribe.[17]

On August 3, 2017, the Staff moved for summary disposition of Contentions 1A and 1B, arguing that further attempts at consultation with the Tribe would be unlikely to result in an acceptable settlement.[18] With respect to its obligations under NEPA, the Staff argued that its

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L. Jamerson Concerning the NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017); *see also* LBP-17-9, 86 NRC at 173.

[13] *See* NRC Staff Final Status Report (Aug. 3, 2017) (Final Status Report).

[14] *See* Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock In situ Uranium Recovery Project (Jan. 31, 2017) (ML17060A260) (Teleconference Summary).

[15] *See* Ex. NRC-008-A, FSEIS § 1.7.3.5, at 1-24 to 1-26.

[16] Teleconference Summary at 1. The Makoche Wowapi proposal included a professional survey with established protocols for identification of historical sites with Makoche Wowapi/Mentz-Wilson Consultants, LLP, acting as contractor to conduct the survey. This approach was estimated to cost $818,000. *See* Ex. NRC-008-A, FSEIS § 1.7.3.5, at 1-23; LBP-17-9, 86 NRC at 181 n.66; *see also* Letter from Trina Lone Hill, Oglala Lakota Cultural Affairs & Historic Preservation, to Cinthya I. Román, NRC, at 8 (May 31, 2017) (ML17152A109); Staff Motion at 28-29.

[17] Final Status Report at 2.

[18] *See* Staff Motion; Final Status Report.

efforts satisfied the statute because "[u]nder NEPA's 'hard look' standard, the proper inquiry is not whether the Staff obtained complete information on the sites of cultural, historical, and religious [significance] to the Oglala Sioux Tribe, but whether the Staff made reasonable efforts to do so."[19]

Powertech filed a brief in support of the Staff's motion, and the Intervenors opposed it.[20] With respect to the adequacy of the survey that had been proposed, the Tribe asserted that the proposed open site survey was not scientific or methodical, and that the survey should be conducted by professionals, in consultation with the Oglala and other Sioux Tribes. The Tribe argued that an open site survey conducted solely by Tribal representatives would essentially place the onus on the Tribe to survey the site and catalogue cultural resources there.[21]

The Board found that there was no remaining material issue of fact regarding the Staff's consultation with the Tribe. It found that the Staff's attempts at consultation had satisfied the requirements of the National Historic Preservation Act and, therefore, granted summary disposition of Contention 1B.[22] But with respect to Contention 1A, the Board noted that no additional survey had been performed (such that the deficiencies in the FSEIS remained) and

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[19] Staff Motion at 34 (citing *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980)).

[20] *Brief of Powertech (USA) Inc. in Support of the United States Nuclear Regulatory Commission Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017); *Oglala Sioux Tribe Response in Opposition to NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017) (Tribe Response in Opposition); *Consolidated Intervenors' Opposition to Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017).

[21] *See* LBP-17-9, 86 NRC at 193 (citing Tribe Response in Opposition at 33).

[22] *Id.* at 188-90.

found that there was still a disputed fact issue as to whether the Staff's effort to characterize cultural resources at the site was reasonable.[23] More specifically, the Board found that the

> Tribe's challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.[24]

Powertech appealed the denial of the Staff's motion with respect to Contention 1A. Powertech requests that we "direct NRC Staff to supplement the [FSEIS] with all data and information for activities conducted to date by NRC Staff on historic and cultural resources and order the closure of Contention 1A upon completion of such supplement."[25] Powertech also asks for "expedited review" because, it claims, the State of South Dakota and the U.S. Environmental Protection Agency and Bureau of Land Management are waiting for the NRC to approve the FSEIS supplement and end this proceeding before they grant approvals necessary for Powertech to begin operations.[26] Powertech also contended, in support of this request, that the Commission's expedited consideration of its petition could have rendered moot certain issues in the Tribe's petition for review before the D.C. Circuit. [27]

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[23] *Id.* at 194.

[24] *Id.* at 198.

[25] Petition at 1-2. The Staff continues to work to resolve the outstanding issues identified in LBP-15-16 and LBP-17-9. *See* Letter from Cinthya I. Román, NRC, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Dec. 6, 2017) (ML17340B374) (Proposal) (describing proposal to identify historic, cultural, and religious sites at the Dewey-Burdock site). Powertech is a wholly-owned subsidiary of Azarga.

[26] Petition at 20; *see also Reply to Oglala Sioux Tribe's and Consolidated Intervenors' Opposition to the Petition for Review of LBP-17-09*, at 5 (Dec. 18, 2017).

[27] Petition at 20-21.

II. DISCUSSION

A. Powertech's Petition Does Not Meet the Standard for Interlocutory Review

A board's denial of a motion for summary disposition is an interlocutory decision.[28] We generally disfavor interlocutory review; our rules of procedure provide for such review only where the petitioner can show that it is threatened with "immediate and serious irreparable impact" or the board's decision "affects the basic structure of the proceeding in a pervasive and unusual manner."[29]

Powertech does not address the standard for interlocutory review in its petition. Nonetheless, we find, based on the record, that the standard, as stated in 10 C.F.R. § 2.341(f)(2), has not been met.[30] First, we find that Powertech will face no immediate and serious irreparable harm as a result of the Board's ruling. Powertech's request for "expedited review" claims that it will be harmed by delay and expense.[31] But we have "uniformly rejected" arguments that "expenses of any kind" constitute irreparable injury.[32] And, although Powertech

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[28] *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251 (2011); *Nuclear Innovation North America, LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203 (2011); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 810-11 (2011), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34 (2008) (grant of summary disposition motion, where other contentions are pending in the proceeding, is interlocutory).

[29] *See* 10 C.F.R. § 2.341(f)(2)(i)-(ii). Absent a finding that these circumstances are present, Intervenors would have to wait until the disposition of Contention 1A before they could seek review of the Board's summary disposition of Contention 1B.

[30] Powertech addresses the standard provided in 10 C.F.R. § 2.341(b), which governs petitions for review of final Board decisions, but, as noted above, LBP-17-9 is not a final decision.

[31] Petition at 20.

[32] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 135 (2009) ("Indeed, we have found *no instance* in this agency's jurisprudence where either we or our boards have ruled that expenses of any kind constituted 'irreparable injury.' . . . [I]n situations where, as here, a movant for a stay or interlocutory review claims 'irreparable injury' based on excessive or unnecessary litigation expenses[,] we have uniformly rejected such arguments."); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3),

suggests that other state and federal approvals depend on the outcome of this litigation, we do not view that assertion, even if we deemed it accurate, to warrant deviation from our standard process here. In addition, it is not apparent that the Board's ruling has any effect on the "structure of the proceeding," let alone a "pervasive and unusual" one.[33] This proceeding will continue as it has since 2015, when the Board ruled in favor of the Tribe on Contention 1A.[34]

Although Powertech's failure to meet the standard for interlocutory review is a sufficient reason to deny its petition, we also find, as described below, that it has failed to show that the Board erred in denying its motion.

B. Powertech Has Not Shown that the Board Erred in Denying Summary Disposition

Summary disposition is appropriate where there is no remaining material issue of fact. The standards governing summary disposition are set forth at 10 C.F.R. § 2.710(a) and "are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."[35] Under those standards, the moving party has the initial

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CLI-10-30, 72 NRC 564, 569 (2010) (increased litigation and delay do not justify interlocutory review); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001) (increased litigation resulting from the admission of a contention does not constitute serious or irreparable harm); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61-62 (1994) (denial of motion for summary disposition or dismissal).

[33] The expansion of issues for resolution and the continuation of litigation that results from admitting a contention (*see Haddam Neck*, CLI-01-25, 54 NRC at 374) or denying summary disposition (*see Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63) does not necessarily have a "pervasive and unusual" effect on the litigation. It is simply part of the ebb and flow that characterizes complex adjudication.

[34] Powertech's petition does not elaborate on how a favorable Commission ruling would have "moot[ed]" the Tribe's petition for review of CLI-16-20 before the D.C. Circuit, *see* Petition at 2, 5, 20-21, and it is not apparent to us that interlocutory review would necessarily have had that result. Because this argument is not fully developed, we do not rule on whether potentially mooting a petition for review would present appropriate grounds for interlocutory review.

[35] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010); *see also Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

burden of showing that no genuine issue of material fact remains in the proceeding.[36] If the nonmoving party opposes the motion, it cannot rest on the allegations or denials of a pleading; instead, it must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial."[37]

Powertech's Petition does not address the standard for granting summary disposition, that is, the standard under which the Board ruled on Contention 1A. But Powertech does argue that there is a logical contradiction in the Board simultaneously finding that the Staff had complied with its consultation obligations under the NHPA while at the same time falling short in its duties under NEPA.[38] To this end, Powertech asserts that the Board's logic in LBP-17-9 clashes with its interpretation of the same statutes in LBP-15-16.[39] In LBP-15-16, the Board found with respect to Contention 1A that

> the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement has not been satisfied[.][40]

Powertech points out that (in a separate section of LBP-15-16), the Board stated that "[t]his additional consultation is required in order (1) to satisfy the hard look at impacts required by NEPA and to supplement the FSEIS, if necessary; and (2) to satisfy the consultation requirements of the NHPA."[41] Powertech interprets these statements to mean that additional

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[36] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[37] *Id.* at 324 (internal quotation marks omitted).

[38] Petition at 12-16.

[39] *Id.*

[40] LBP-15-16, 81 NRC at 655.

[41] *Id.* at 657.

consultation alone is sufficient to satisfy both NHPA and NEPA.[42] Therefore, it argues, it is "legally illogical that you can conduct adequate consultation with a Native American Tribe on one hand and then be deemed to have failed to "[satisfy]" another statute with similar requirements on the other hand."[43]

We disagree. We do not interpret the Board's language in LBP-15-16 to indicate that the Staff would necessarily satisfy its NEPA obligations simply through consultation with the Tribe. Rather, the Board explained that consultation was necessary to achieve the *end* of meeting NEPA's "hard look" requirement; it did not suggest that the mere act of consultation would in and of itself be sufficient. And, in any event, NHPA and NEPA are separate statutes imposing different obligations on the Staff. It is thus not "legally illogical" for the Board to grant summary disposition with respect to one contention while denying it with respect to the other.

Nor do we find that the Board erred in holding that there was an unresolved dispute of material facts. The Board held that "there remains a material factual dispute as to whether the NRC Staff's chosen methodology for obtaining information on the tribal cultural resources was reasonable."[44] As the Board noted and the Staff acknowledged, the parties continued to dispute what would constitute a reasonable method to assess cultural resources at the site. We find that the Board did not err in its application of the standards for summary disposition.

Finally, much of Powertech's Petition and Reply is devoted to arguing that the Tribe has unreasonably refused to cooperate in the consultation process. For example, Powertech argues that the Staff has satisfied NEPA because it has made reasonable efforts to obtain the

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[42] Petition at 12 n.17.

[43] *Id.* at 16.

[44] LBP-17-9, 86 NRC at 194.

missing information and therefore, the information is not "reasonably available."[45] To the extent Powertech argues that the FSEIS was already sufficient before the 2014 evidentiary hearing, it is a challenge to the Board's findings in LBP-15-16 and essentially a late-filed motion for reconsideration of CLI-16-20. We previously found that these arguments did not establish "clear error" by the Board.[46] Powertech does not provide a compelling reason to revisit those issues at this time. To the extent Powertech argues that the Tribe unreasonably failed to cooperate following the Board's ruling in LBP-15-16, we note that the reasonableness of the Tribe's efforts to help identify cultural resources at the site goes to the merits of Contention 1A. We discern no error in the Board's identification of a dispute with respect to this issue, and we leave it to the Board to resolve it in the first instance.

[45] *See* Petition at 13 (arguing that the Board ignored Powertech's expert witness statement and Powertech and Staff witness testimony at the 2014 evidentiary hearing), 15-16, 19 (arguing that site identification requirements were satisfied by the participation of other tribes and by the binding Programmatic Agreement), 17-18 (urging the Commission to adopt the arguments in then-Commissioner Svinicki's partial dissent); *see also Brief of Powertech (USA), Inc. in Support of United States Nuclear Regulatory Commission Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 7, 2017), at 10-11.

[46] *See* CLI-16-20, 84 NRC at 246-47.

III. CONCLUSION

For the foregoing reasons, we deny review of the Board's decision in LBP-17-9.[47]

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of July, 2018

[47] Because we decline review, Powertech's request for expedited review is moot.

Chairman Svinicki, Additional Views

I fully join with the majority's order today as it comports with well-established Commission precedent on the issues of interlocutory appeals and summary disposition. Given the posture of this proceeding, these strict standards are controlling. However, my position with respect to the underlying issues surrounding Contentions 1A and 1B in this proceeding has not changed. If anything, recent developments in this proceeding reinforce my conclusion that the Board's legal errors created an unworkable framework by requiring the parties to take measures beyond those reasonable efforts required by NEPA and the NHPA. As expressed in my earlier dissent with respect to Contention 1A, instead of considering the Staff's argument that it could not reasonably obtain the information it acknowledged was missing, the Board invalidated the FSEIS simply because the information was missing in the first place.[1] For Contention 1B, the Board sought to determine "which party or specific action led to the impasse preventing an adequate tribal cultural survey"[2] instead of determining whether the Staff had provided the Tribe a "reasonable opportunity" for consultation as required by statute.[3] Because the Board applied the legal standards to Contentions 1A and 1B incorrectly, the Board's decision should have been overturned with respect to those two contentions and the proceeding terminated at that time. Now, almost two years later, this proceeding remains ongoing.

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[1] LBP-15-16, 81 NRC 618, 655 (2015). Several authorities relied on by the Staff supported the position that agencies need only undertake reasonable efforts to acquire missing information. *See* 40 C.F.R. § 1502.22; *Town of Winthrop v. FAA.*, 535 F.3d 1 (1st Cir. 2008); *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010).

[2] LBP-15-16, 81 NRC at 656.

[3] 36 C.F.R. § 800.2(c)(2)(ii)(A).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-18-07)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
COMMISSION MEMORANDUM AND ORDER (CLI-18-07)

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Dated at Rockville, Maryland
this 24th day of July, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns
Annie Caputo
David A. Wright

In the Matter of POWERTECH (USA), INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-19-01

MEMORANDUM AND ORDER

We have received the views of the parties to this proceeding regarding how the agency should respond to the remand from the U.S. Court of Appeals for the District of Columbia Circuit in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). For the reasons explained below, we leave the license previously issued to Powertech (USA), Inc. (Powertech) in place for now, consistent with the court's choice of remedy. We also order Powertech to notify the Atomic Safety and Licensing Board (Board) and the parties 60 days in advance of conducting any activities at the site under its NRC license should this adjudication still be pending at that time. This notification will allow the Board to take any necessary action regarding Powertech's license before such activities at the site would commence.

I. BACKGROUND

At the time the Board issued its Partial Initial Decision in this proceeding, the NRC Staff had already issued a license to Powertech for an *in situ* uranium recovery facility in Custer and Fall River Counties, South Dakota. The Staff took this action, consistent with NRC regulations, after completing its review of Powertech's application—a review that included a full safety

review and the issuance of a draft site-specific environmental impact statement for public comment, a final site-specific environmental impact statement, and a record of decision.[1] In its Partial Initial Decision, the Board found that the Staff had not sufficiently considered the potential impacts of the proposed facility on Oglala Sioux Tribe (Tribe) cultural resources under the National Environmental Policy Act (NEPA).[2]

The Board, despite identifying this NEPA-analysis deficiency (and one other related deficiency, under a different statute),[3] chose not to suspend Powertech's license, but it did retain jurisdiction to ensure the deficiency would be properly addressed.[4] On appeal, we left undisturbed both the Board's finding and its remedy.[5]

The Tribe petitioned for review of the Commission's order in the D.C. Circuit and challenged, *inter alia*, the Commission's decision not to order immediate vacatur of Powertech's license in light of the Board's findings. Of relevance here, the D.C. Circuit held that it was inconsistent with NEPA for the NRC to allow Powertech's "project to continue in a manner that

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[1] *See* LBP-15-16, 81 NRC 618, 630-32 (2015); CLI-16-20, 84 NRC 219, 223-24 (2016). Under 10 C.F.R. §§ 2.1202(a) and 2.340(e)(2)(ii), for certain types of applications, the NRC Staff may "issue its approval or denial" of an application before the Presiding Officer has issued an Initial Decision. Applications for uranium recovery facilities are one such type of application.

[2] LBP-15-16, 81 NRC at 653-55; *see also* CLI-16-20, 84 NRC at 243-44.

[3] The Tribe and the Consolidated Intervenors also originally prevailed on the merits before the Board on a related contention (Contention 1B) regarding the Staff's consultations with the Tribe under the National Historic Preservation Act (NHPA). *See* CLI-16-20, 84 NRC at 244. The Board has since granted summary disposition on that contention in favor of the Staff and found that additional efforts subsequent to the initial ruling cured the NHPA deficiency. LBP-17-9, 86 NRC 167, 188-90 (2017).

[4] LBP-15-16, 81 NRC at 658; *see also* CLI-16-20, 84 NRC at 244 ("[T]he Board . . . retained jurisdiction over the proceeding pending the Staff's curing of the deficiencies in the FSEIS and consultation with the Tribe."); *id.* at 244 n.151 ("The Board noted that it could have suspended Powertech's license, and it attributed its decision to leave the license in place to the Tribe's incomplete participation in the consultation process.").

[5] CLI-16-20, 84 NRC at 245-51.

puts at risk the values NEPA protects simply because no intervenor can show irreparable harm," once the NRC had identified, during the adjudicatory hearing process, "a significant deficiency" in the NRC's NEPA compliance.[6]

The court did not, however, vacate Powertech's license. Instead, the court remanded the case to the Commission "for further proceedings consistent with [the court's] opinion," basing its choice of remedy on the court's remand-without-vacatur doctrine under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993).[7] In analyzing the pertinent facts under *Allied-Signal*, the court explained that it had "not been given any reason to expect that the agency will be unable to correct [the Board-identified NEPA] deficiencies," and it also cited Powertech's reliance on NRC's "ruling and settled practice" permitting the license to remain in place and Powertech's representations regarding financial harm that would befall it should action be taken against its license.[8] Further, and "[m]ore important," the court referenced Powertech's representation "that a South Dakota permitting requirement independently bars it from moving forward with construction on the site until the NRC completes its compliance with NEPA."[9] Based on the latter consideration, the court concluded that "it appears that the Tribe will not suffer harm—irreparable or otherwise—from a disposition that leaves the license in effect *for now*."[10]

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[6] 896 F.3d at 538. Based on the Board's summary disposition ruling on Contention 1B, the court in *Oglala Sioux Tribe* limited its holding to Contention 1A. 896 F.3d at 527 n.4. The court also declined to decide the remainder of the issues the Tribe raised in its review petition and found that it lacked jurisdiction to review those issues because "the Commission's order did not end the agency proceeding as to all issues." *Id.* at 527.

[7] *Id.* at 538-39.

[8] *Id.* at 538.

[9] *Id.*

[10] *Id.*

In response to this remand from the court, the Commission issued an order inviting the parties to provide their views on how the agency should proceed.[11] The order specifically requested that "[t]he parties should address, at a minimum, the question of what legal standard the NRC should use" when considering the status of Powertech's license, "to ensure consistency with the court's opinion going forward."[12] The parties have provided their views in response to that order, and the Tribe, Powertech, and the Consolidated Intervenors have also filed responses to those initial filings.[13]

The Tribe relies on 5 U.S.C. § 706, which generally provides the standard for judicial review of agency action, and related federal court precedent to argue that, unless an analysis undertaken pursuant to *Allied-Signal* warrants rebutting the presumption of vacatur, the Commission should vacate Powertech's license based on the finding of a NEPA violation.[14] That *Allied-Signal* analysis, the Tribe asserts, would look to "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[15] The Tribe argues that the record in this proceeding does not currently support any remedy other than vacating the

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[11] Order of the Secretary (Aug. 30, 2018) (unpublished).

[12] *Id.* at 1.

[13] *Oglala Sioux Tribe's Response to the Commission's August 30, 2018 Order* (Sep. 24, 2018) (Tribe's Views); *Powertech (USA), Inc's Response to Commission Inquiry on Legal Standards* (Sept. 24, 2018) (Powertech's Views); *NRC Staff's Response to Order Dated August 30, 2018* (Sep. 24, 2018) (Staff's Views); *Consolidated Intervenors' Views on Agency Response to U.S. Court of Appeals (D.C. Cir) Remand* (Sep. 24, 2018) (Consolidated Intervenors' Views); *Oglala Sioux Tribe's Response to the Parties' Views Regarding the Commission's August 30, 2018 Order* (Oct. 19, 2018) (Tribe's Responsive Views); *Powertech (USA), Inc's Response to Pleadings on Legal Standards* (Oct. 19, 2018) (Powertech's Responsive Views); *Consolidated Intervenors Response to Powertech & NRC Staff Views* (Oct. 19, 2018) (Consolidated Intervenors' Responsive Views).

[14] Tribe's Views at 2-4.

[15] *Id.* at 2 (quoting *Allied-Signal*, 988 F.2d at 151).

license, and it therefore recommends principally that the Commission vacate the license now.[16] The Tribe also argues in the alternative that "should the Commission consider leaving the license in effect, any such decision should be preceded by briefing and an opportunity for the parties (through the ASLB or otherwise) to establish competent evidence on all [*Allied-Signal*] considerations, especially Powertech and NRC Staff's burden to demonstrate disruptive effect."[17] The Consolidated Intervenors expressly adopt the Tribe's views and reiterate their support for 5 U.S.C. § 706 and *Allied-Signal* as supplying the appropriate legal standard.[18] The Staff similarly supports relying on *Allied-Signal* and also cites to *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016), another case in which the D.C. Circuit remanded without vacating the underlying agency action, though in that case the court did require the agency to supplement the relevant EIS before the project moved forward.[19]

Powertech presents an alternative view, arguing that the Commission should apply the stay standard set forth at 10 C.F.R. § 2.1213(d).[20] That standard considers: (1) irreparable injury to the stay requestor; (2) the likelihood of the stay requestor prevailing on the merits in the adjudication; (3) the harm a stay would inflict on the other participants in the adjudication; and

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[16] *Id.* at 2-4.

[17] *Id.* at 4.

[18] Consolidated Intervenors' Views at 1-2.

[19] Staff's Views at 3-4; 827 F.3d at 1084. Elaborating on its recommendation, the Staff suggests that the proper analysis could "consider and weigh, among other factors, the significance of the remaining NEPA deficiency, the prospects for its timely resolution, the potential disruptive consequences to the parties (including consequences to Powertech in light of its representations both about economic harm and its inability to move forward with licensed activities until the contention is resolved), the nature of the cultural-resource protections that the license imposes on Powertech, and the public interest." Staff's Views at 3-4.

[20] Powertech's Views at 4-8.

(4) the public interest.[21] Powertech also references the "no harm, no foul" rationale utilized in another recent D.C. Circuit *in situ* uranium recovery licensing case—involving the Strata Ross facility—and describes that case as "provid[ing] a good substantive comparison" to this one.[22]

The Tribe asserts in its responsive filing that the Staff bears the burden of demonstrating that a remedy other than vacatur is warranted.[23] The Tribe also argues that the D.C. Circuit's *Oglala Sioux Tribe* decision already considered and rejected the applicability of Powertech's recommendations to the instant case.[24] Lastly, the Tribe supports the Staff's reference to the D.C. Circuit's *Hopper* decision, and it also cites an earlier D.C. Circuit decision—*Public Utilities Commission v. FERC*, 900 F.2d 269 (D.C. Cir. 1990)—in which the court upheld an agency's issuance of a conditional approval before completing a hearing on environmental issues, based on the agency not allowing that conditional approval to take effect until completion of the environmental hearing.[25]

II. DISCUSSION

Our analysis of how to proceed on remand in light of the parties' views necessarily begins with the D.C. Circuit's opinion in *Oglala Sioux Tribe*. In its opinion, the D.C. Circuit provided only limited direction as to how the NRC should determine proper remedies if NEPA

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[21] *Id.* at 4; 10 C.F.R. § 2.1213(d).

[22] Powertech's Views at 7-8 (discussing *Nat'l Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (*NRDC*)). Both Powertech and the Staff also argued that the Commission should await the outcome of motions for summary disposition of Contention 1A that, at the time of their filings, were still pending before the Board. They reasoned that the Board could potentially grant summary disposition in response to the motions and terminate the proceedings, thereby mooting the question of interim action on Powertech's license. *Id.* at 8; Staff's Views at 2-3. The Board, however, has since ruled on those motions and denied all requests for summary disposition. LBP-18-05, 88 NRC __ (Oct. 30, 2018) (slip op.).

[23] Tribe's Responsive Views at 2.

[24] *Id.* at 3-6.

[25] *See* 900 F.2d at 282; *see also Oglala Sioux Tribe*, 896 F.3d at 538 (citing that decision).

deficiencies are found in post-license-issuance adjudications. Of particular importance here, given the legal-standard recommendations of the Tribe, the Consolidated Intervenors, and the Staff, we observe that the court expressly declined to decide whether the NRC may itself lawfully fashion remedies for NEPA violations based on an analysis of equitable factors in accordance with *Allied-Signal*.[26] This was the case even though the court *itself* relied expressly on *Allied-Signal* in reaching its own decision to remand the case to the NRC without vacating Powertech's license. Consequently, although we see parallels between the question a court faces when it considers remanding without vacatur and the question we face here, *Oglala Sioux Tribe* did not resolve whether, as a general matter, it would be permissible for the NRC to model its own legal analysis in this context after *Allied-Signal*. As discussed below, we need not resolve the question here to proceed in accordance with the remand.

As to Powertech's recommendation to apply the stay standard at 10 C.F.R. § 2.1213(d), we agree with the Tribe that *Oglala Sioux Tribe* plainly precludes us from adopting that recommendation.[27] The court described the scope of its ruling against the NRC as follows: "To be clear, today we hold only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm."[28] In light of the clear import of the court's opinion, we decline to employ a standard that, like 10 C.F.R. § 2.1213(d), turns on the existence of irreparable injury.

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[26] *See* 896 F.3d at 536 (stating that "the agency fails to identify any statute that authorizes it not to comply with NEPA on equitable grounds" but declining, after determining that the NRC had not yet performed an analysis akin to a D.C. Circuit remand-without-vacatur analysis, to decide "whether the absence of statutory authority is sufficient to reject the analogy to judicial remand-without-vacatur").

[27] *See id.* at 538; 10 C.F.R. § 2.1213(d)(1) (requiring the presiding officer to consider "[w]hether the [stay] requestor will be irreparably injured unless a stay is granted").

[28] *Oglala Sioux Tribe*, 896 F.3d at 538.

We also agree with the Tribe that the D.C. Circuit's "no harm, no foul" rationale in *NRDC* (involving the Strata Ross facility) cannot govern our analysis here. In that case, the D.C. Circuit declined to impose a remedy for an NRC-identified NEPA-compliance deficiency on the ground that the NRC had already corrected the deficiency itself through the adjudicatory hearing process.[29] Here, in contrast, the NEPA deficiency has not been corrected, and the Board has recently determined that summary disposition of the outstanding NEPA contention is not warranted.[30] Moreover, the D.C. Circuit in *Oglala Sioux Tribe* expressly cited its prior holding in *NRDC*, but it then held the Powertech scenario to be distinguishable.[31] Therefore, we decline to treat the facts before us regarding Powertech as analogous to the facts that supported the D.C. Circuit's decision in *NRDC*.

Although providing some specific direction on what the NRC must not do, the *Oglala Sioux Tribe* opinion does not expressly set forth what the NRC *should* do, whether on remand in this case or generally for future cases. We have, however, identified certain principles in the court's opinion that we believe should guide our path forward. First, the court identified Powertech's near-term inability to move ahead with the project due to the absence of another required permit as the key factor supporting the court's decision to leave Powertech's license in place "for now."[32] The court's reasoning there squared with the court's earlier description of the "problem" posed by the NRC action under review.[33] The court also described its holding as a

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[29] 879 F.3d at 1211-12.

[30] LBP-18-05, 88 NRC __ (slip op. at 45).

[31] 896 F.3d at 534 n.10 (citing *NRDC*, 879 F.3d at 1211-12) ("This circuit has also sometimes regarded deviations from NEPA as harmless when an agency subsequently completed a comprehensive environmental review before the matter reached our court. . . . In this case, however, the agency has not yet completed a valid review.").

[32] *Id.* at 538 (emphasis omitted).

[33] *See id.* at 533 ("[T]he nature of the agency action in this case puts the problem in high relief. . . . The Tribe is concerned that mining, as well as the construction and other land

restriction on the NRC "permit[ting] a project to continue in a manner that puts at risk the values NEPA protects," and it clarified immediately thereafter that the court was not holding that the NRC's identification of a NEPA deficiency during a post-license-issuance hearing process necessarily requires that the NRC vacate the license.[34] Specifically, the court declined to hold that the NRC could never, after finding a NEPA deficiency in a post-license-issuance adjudication, permissibly leave a license in place based on a harmless error finding or based on "protective conditions the Commission might impose . . . during an administrative remand intended to cure a NEPA deficiency."[35] Thus, of particular concern to the court in this case was the potential that the license might actually be used to the detriment of resources before the NRC has remedied the Board-identified NEPA deficiency.

Second, the court's choice of remedy suggests to us that vacating Powertech's license will continue to remain inappropriate unless there is some material change in the circumstances the court considered under its *Allied-Signal* analysis. While the court declined to specify whether the NRC may consider equitable factors in the first instance when determining a remedy for a NEPA deficiency, we view our task here as implementing the court's remedy—which was expressly based on equitable considerations—rather than performing our own equitable analysis *de novo.*

Lastly, the court determined that the NRC "placing the burden on the Tribe to show harm" in order to obtain vacatur of the license was "especially inappropriate" here, "because the

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disturbances that precede mining, will damage those resources. The purpose of an EIS is, in part, to determine whether the land contains such resources and where they are located, so that damage to them can be avoided or mitigated. If the project is permitted to go forward without the necessary land survey, such damage may well be done." (citation omitted)).

[34] *Id.* at 538.

[35] *Id.*

inadequate EIS may well make doing so impossible."[36] Accordingly, whatever approach we adopt on remand must not require, as a prerequisite to NRC action regarding Powertech's license, that the Tribe identify specific risks to cultural resources before the NRC has met its own legal burden under NEPA to identify such risks.

Applying the principles discussed above in light of the parties' filings, we find the proper course to be to preserve the court's choice of remedy by continuing to leave the license in place for now, while imposing a protective measure to prevent harm to the Tribe's cultural resources while the identified NEPA deficiency is remedied. Based on the parties' statements of views, the key facts supporting the court's choice of remedy do not appear to have changed substantially since the court decided *Oglala Sioux Tribe*, which counsels, in our view, for continuing the court's remedy for the time being. Powertech continues to represent that action taken against its license would cause Powertech financial harm and that it cannot, in any event, make use of its NRC license yet, given the absence of necessary permits from the U.S. Environmental Protection Agency (EPA) and the State of South Dakota.[37] According to Powertech, South Dakota "awaits action by both NRC and EPA to continue its large-scale mine permit and water rights administrative proceedings, which were stayed pending these two outcomes."[38] The Tribe disputes Powertech's assertions regarding the potential financial consequences of the NRC altering the status of the license.[39] But the Tribe does not take specific issue with what the court viewed—and we view—as the more important point: that

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[36] *Id.* at 534-35.

[37] Powertech's Views at 7-8; Powertech's Responsive Views at 2-5; *see also* Staff's Views at 2 ("The license is not currently (and to date, has never been) in use."). Powertech also added, in its Responsive Views, that a necessary Bureau of Land Management approval for the project is still outstanding. Powertech's Responsive Views at 3-4.

[38] Powertech's Views at 7.

[39] Tribe's Views at 2-4.

leaving the license in place for now poses no harm to the Tribe because Powertech is not yet in a position to use its NRC license.[40] Until Powertech can lawfully use its NRC license, the risk of harm occurring to any Tribal cultural resources that is traceable to the identified NEPA deficiency will remain hypothetical. And it may never mature into a non-hypothetical risk, if Powertech is correct that South Dakota's permitting process is stayed pending the outcome of the NRC adjudicatory proceeding. Continuing to leave Powertech's license in place for now thus appears to us to be the approach most consistent with the court's opinion.

We must also account for the possibility that these circumstances could change. The court's determination that Powertech's project cannot currently move forward because South Dakota is waiting for the NRC's NEPA proceedings to conclude was based on representations made by Powertech's counsel. We consider it fair and appropriate to hold Powertech to these representations. In addition, the burden naturally should rest with Powertech to notify the NRC and the parties if there are material new developments. And to safeguard the NRC's interest in faithfully and fully complying with NEPA and the court's ruling, this notice must occur before Powertech engages in any activity at the Dewey-Burdock site under its NRC license that could potentially put Tribal resources at risk.[41]

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[40] *See generally* Tribe's Views; Tribe's Responsive Views. Relatedly, we note that Powertech's NRC license itself prohibits operations at any production area at the site until Powertech has "obtain[ed] all necessary permits, licenses, and approvals from the appropriate regulatory authorities." Ex. NRC-12 at 12 (Standard Condition 12.1).

[41] We recognize that not all activities Powertech might undertake at the site would necessarily require an NRC license. *See* LBP Order (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600) (May 20, 2014), at 7 (unpublished) (ML14140A470) (Board's Stay Denial Order) ("At oral argument, counsel for Powertech stated, without contradiction, that the ground disturbing work contemplated for the next few months could be accomplished without the NRC license."). Powertech is, however, still bound by its NRC license so long as that license remains in effect, including the license's requirement to comply with the Programmatic Agreement entered into under the NHPA. *See* Ex. NRC-12 at 5-6 (License Condition 9.8 addressing "Cultural Resources"); *see also* CLI-16-20, 84 NRC at 260 (referencing the Programmatic Agreement's protections for cultural resources discovered during project activities).

Accordingly, we order Powertech to notify the Board and the parties no later than 60 days prior to performing any activities at the Dewey-Burdock site that would require an NRC license, unless this adjudicatory proceeding is no longer pending at the time. Upon receipt of such a notice, the Board is directed to proceed expeditiously in soliciting the parties' views and considering, in light of the proceeding's status and consistent with this order, whether the Board must take action regarding Powertech's NRC license to preserve the environmental status quo.[42]

Finally, we observe that our decision in this matter is tied to the particular facts before us. Certainly, we consider it a key element of our task on remand to monitor the facts the court identified, under *Allied-Signal*, as supporting its decision not to vacate Powertech's license so that we can take prompt action consistent with the court's opinion if those facts materially change. Yet, we do not address today the question, left expressly open by the court, of whether, or under what circumstances, an NRC presiding officer should perform an *Allied-Signal*-style equitable analysis in the first instance upon finding a significant NEPA deficiency.[43] We also are not questioning today—and the court expressly did not opine upon—the propriety of relying on a harmless error standard in different circumstances.[44] This order also does not revisit the remedial approach employed in the Strata Ross proceeding, under a different factual

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[42] Because the outstanding NEPA contention may be resolved before Powertech obtains all other necessary permits to proceed with the project—meaning that the eventuality requiring Powertech to provide notice may never come to pass—we decline to order the addition of an express new condition to Powertech's license. Nonetheless, Powertech's license already states that it is "subject to all applicable rules, regulations, and *orders* of the Nuclear Regulatory Commission now or hereafter in effect," Ex. NRC-12 at 1 (emphasis added), which would include the order we issue today.

[43] *See Oglala Sioux Tribe*, 896 F.3d at 536.

[44] *See id.* at 538 ("[W]e do not decide that there is no version of a harmless error rule that the Commission may apply."); CLI-16-20, 84 NRC at 235-37 (finding harmless error in connection with Tribe's contention challenging lack of site-specific scoping, where Tribe received comparable notice and participation opportunities via other means).

scenario, that the D.C. Circuit upheld in *NRDC*. In sum, we do not attempt here to set forth a comprehensive formula for addressing any future circumstances in which significant NEPA deficiencies are found through our hearing process after staff issuance of a license under 10 C.F.R. § 2.1202(a).[45] Nonetheless, we expect that the principles discussed in this order, and in the court's *Oglala Sioux Tribe* opinion, will help to frame and inform consideration of any future questions regarding remedy that may arise in those limited categories of NRC hearings for which post-license-issuance hearings are permissible under § 2.1202(a).

III. CONCLUSION

For the foregoing reasons, we leave Powertech's license in place for now, but we order Powertech to notify the Board and the parties no less than 60 days prior to commencing any activities at the Dewey-Burdock site under its NRC license, if the adjudicatory proceeding regarding Contention 1A remains pending at the time, so that the Board may consider expeditiously whether action is necessary to ensure full compliance with NEPA.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 31st day of January, 2019.

[45] Further, while *Oglala Sioux Tribe* and this order plainly restrict the use of the 10 C.F.R. § 2.1213(a) stay standard where a significant NEPA deficiency has already been found through our hearing process, neither we nor the court in *Oglala Sioux Tribe* has deemed that standard, or its associated burdens, inapplicable to the scenario for which it *is* traditionally used—i.e., for requests to stay a staff action taken under 10 C.F.R. § 2.1202(a) that are filed *before* the presiding officer has decided the pertinent contention(s) on the merits. *See, e.g.,* Board's Stay Denial Order (denying Tribe's request to stay Powertech's license after license issuance but before the Board decided Contentions 1A and 1B on the merits).

Commissioner Baran, Dissenting

As the Commission has observed many times, NEPA is a procedural statute.[1] It establishes a process to ensure that, when an agency makes a decision that could affect the environment, that decision is informed by a thorough evaluation of the expected environmental impacts. A basic premise of the statute is that informed decisionmaking will help protect the environment by forcing agencies to consider the consequences of potential actions as well as alternatives that could be less environmentally damaging. That commonsense approach simply does not work if the agency decision precedes the environmental review. Thus, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[2] When the Commission allows a Board to correct an inadequate NEPA document through augmentation *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

In two recent cases, the D.C. Circuit made it clear that it does not approve of the Commission's current practice of allowing for the augmentation of an inadequate NEPA environmental review after the decision to issue a license has already been made. In *NRDC v. NRC*, the Court examined this practice. While the Court of Appeals found that there was no concrete harm in that particular case, the Court stated:

> We do not mean to imply the procedure the Board followed was ideal or even desirable. Certainly it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued.[3]

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[1] *See e.g., Entergy Nuclear Operations., Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 (2011).

[2] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

[3] *NRDC v. NRC*, 879 F.3d 1202, 1212 (D.C. Cir. 2018).

The second case is the one before us now on remand. In *Oglala Sioux Tribe*, the Court of Appeals went even further than it had in *NRDC v. NRC* in broadly criticizing the agency's practice. The Court explained:

> The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm.[4]

The Court added:

> The agency's decision in this case and its apparent practice are contrary to NEPA. The statute's requirement that a detailed environmental impact statement be made for a "proposed" action make clear that agencies must take the required hard look *before* taking that action.[5]

The Court of Appeals held that "once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm."[6] It then remanded the case to the Commission to decide whether to leave Powertech's license in place. In order to allow the Commission time to make that decision, the Court weighed the equitable factors and opted to leave "the license in effect *for now*."[7]

The Commission's decision states that our task is "implementing the court's remedy … rather than performing our own equitable analysis *de novo*."[8] I disagree. Performing a *de novo* review of whether to vacate, suspend, modify, or leave in place Powertech's license is precisely our role on remand. Though the Court did not immediately vacate the Commission's prior ruling

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[4] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 523 (D.C. Cir. 2018).

[5] *Id.* at 532.

[6] *Id.* at 538.

[7] *Id.*

[8] Memorandum and Order at 9.

that the license should remain in effect, the Commission can and should further consider the appropriate remedy for the agency's violation of NEPA in this case. That is the very purpose of the remand.

In my view, we should not make a determination about the appropriate remedy based solely on the representations of the parties. Unlike the Court of Appeals, we are in a position to hold an evidentiary hearing, at which the parties could provide evidence of the real-world consequences of each of the potential remedies. The development of a factual record would enable the Commission to weigh the equities at stake and make a fact-based decision about whether to leave the license in place prior to the NRC Staff's completion of an adequate NEPA analysis.

Therefore, I respectfully dissent from the Commission's decision. Instead of making a decision about whether to leave Powertech's license in place without the benefit of a full factual record, I believe the Commission should find that a focused evidentiary hearing is necessary.

The Commission's decision also should address the broader question of how the agency will ensure that it is complying with NEPA in cases where the adjudicatory process occurs after the issuance of a license. The Court of Appeals decisions are a strong signal that the Commission must act to bring the agency's doctrine and practice into compliance with NEPA. The Staff's practice has been to issue materials licenses before the completion of contested hearings on environmental matters. Our regulations governing materials licenses provide:

> During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which the subject of the hearing and as authorized by law, the NRC Staff is expected to promptly issue its approval or denial of the application . . . .[9]

The Staff has read this provision to require it to issue a license once it completes its safety review and issues a final NEPA environmental analysis. This interpretation of the

[9] 10 C.F.R. § 2.1202(a).

regulation has been paired with a Commission adjudicatory doctrine that permits the NEPA environmental analysis to be augmented by adjudicatory decisions occurring *after* issuance of a materials license. By allowing the significant deficiencies of NEPA analyses to be corrected by adjudicatory proceedings *after* a license has already been issued, the Commission has put NRC on course to repeatedly and predictably violate a core requirement of NEPA.

We have a responsibility to avoid this result. There are at least two ways to address this problematic interaction between our regulation and our augmentation doctrine: we could initiate a rulemaking to change the regulation or refine the adjudicatory doctrine. This case is not the appropriate venue for a decision about whether to initiate a rulemaking, but it is the proper vehicle for revising the augmentation doctrine. We should take this opportunity to change the Commission's current practice of allowing for the augmentation and correction of a significantly inadequate NEPA environmental review after the decision to issue a license has already been made. The Commission should hold that the Board cannot correct any significant deficiencies of a NEPA environmental review through the hearing process after a licensing action has already been taken in reliance on the deficient NEPA analysis.[10]

[10] This approach would not require completing the hearing before making a licensing decision, and it would not change Commission jurisprudence allowing for augmentation of the environmental record *before* a licensing action is taken. Rather, if a licensing decision is based on an environmental review that the Board or Commission later finds to be significantly deficient, then after-the-fact augmentation of the environmental review with the hearing record would not available as an option to correct the deficiency.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-19-01)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
COMMISSION MEMORANDUM AND ORDER (CLI-19-01)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of POWERTECH (USA), INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-19-09

MEMORANDUM AND ORDER

Powertech (USA), Inc. (Powertech) petitions for review of the Atomic Safety and Licensing Board's decision denying the Staff's motion for summary disposition of Contention 1A.[1] Powertech requests that we reverse the Board's denial of summary disposition and terminate this proceeding.[2] For the reasons described below, we deny Powertech's petition for review.

[1] *Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-18-05* (Nov. 26, 2018) (Petition); *see also* LBP-18-5, 88 NRC 95 (2018).

[2] Petition at 1-2, 25.

I. BACKGROUND

A. The Litigation Prior to LBP-18-5

The Board described the history of this proceeding in its decision.[3] Briefly, this proceeding commenced when the Oglala Sioux Tribe (Tribe) and Consolidated Intervenors (together, Intervenors) were granted intervention and a hearing concerning Powertech's 2009 license application.[4] The Staff issued a Final Supplemental Environmental Impact Statement (FSEIS) in January 2014 and issued the license to Powertech in April 2014.[5] An evidentiary hearing followed in August 2014.

In 2015, the Board issued a partial initial decision, which found in favor of the Staff and Powertech on all contentions except Contentions 1A and 1B, both of which concerned the Staff's consideration of the potential impacts of the proposed project on Native American cultural resources at the project site.[6] With respect to Contention 1A, the Board found that the FSEIS "does not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes," without which the National Environmental Policy Act's (NEPA) "hard look requirement has not been satisfied."[7] The Board found that suspension of the license was not necessary, but it held that the Staff should work to remedy the deficiencies in the FSEIS, report to the

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[3] LBP-18-5, 88 NRC at 101-07.

[4] LBP-10-16, 72 NRC 361, 376 (2010).

[5] *See* Exs. NRC-008-A-1 to NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014) (ADAMS accession nos. ML14246A350, ML14246A329, ML14246A330, ML14246A331); Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408).

[6] LBP-15-16, 81 NRC 618, 708-10 (2015).

[7] *Id.* at 655.

Board on its progress, and eventually resolve the contention with a settlement agreement or, if not able to reach a settlement, with a motion for summary disposition.[8] In 2016, we affirmed the Board decision in LBP-15-16 in all respects relevant to this appeal.[9]

Over the course of the following three years, the Staff sought the Tribe's participation in properly characterizing cultural resources at the site. In April 2017, the Staff offered the Oglala Sioux Tribe an opportunity to participate in a cultural resources survey, but in May 2017, the Tribe declined, providing a list of specific conditions for its participation.[10] In August 2017, the Staff filed its first motion for summary disposition of Contentions 1A and 1B and argued that further efforts to consult with the Tribe would be unlikely to result in an agreement.[11] The Board granted summary disposition of Contention 1B but denied it with respect to Contention 1A.[12] Although Powertech sought the Commission's review of the Board's decision with respect to Contention 1A, the Staff continued to work with the Tribe to find an acceptable method to identify cultural resources at the site.[13] We declined Powertech's petition for interlocutory review of the Board's denial of summary disposition.[14]

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[8] *Id.* at 657-58, 710.

[9] *See* CLI-16-20, 84 NRC 219, 262 (2016). We affirmed the Board's decision on the merits, but we disagreed that its ruling rendered the decision non-final. We held that the Board's decision was final and appealable, although we ultimately approved the Board's approach in retaining jurisdiction over the matter until the deficiencies identified in the FSEIS were resolved. *See id.* at 242-43, 250-51.

[10] *See NRC Staff's Motion for Summary Disposition of Contention 1A* (Aug. 17, 2018) (Staff Motion), Attach. 1, NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contention 1A, at 2 (Statement of Facts).

[11] *NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017).

[12] LBP-17-09, 86 NRC 167 (2017). Contention 1B concerned whether the Staff had satisfied its obligation under the National Historic Preservation Act (NHPA) to consult with the Tribe.

[13] *See* Staff Motion, Attach. 1, Statement of Facts at 3-12.

[14] CLI-18-7, 88 NRC 1 (2018).

B. The March 2018 Approach

In March 2018, the Staff proposed a survey approach that appeared to potentially satisfy the Tribe's specific requests for a cultural resources site survey as stated in the Tribe's May 2017 response to the Staff's April 2017 proposal.[15] This approach involved hiring a contractor to facilitate a new survey, inviting other Lakota Sioux Tribes that had not participated in an earlier survey, obtaining oral histories from tribal elders, allowing more than one opportunity to examine the site, and allowing the participating Tribes to comment on the field survey report.[16] According to the proposal, the precise survey methodology would be worked out in consultation among the Staff, the contractor, and the Tribe in the weeks before the initial phase of the survey.[17]

After some initial disagreement, Powertech and the Tribe eventually agreed to the March 2018 Approach.[18] With the parties in agreement, the Staff performed various activities in preparation for the first phase of the onsite survey, scheduled to take place during the two-week period of June 11-22, 2018.[19] On June 1 and 4, 2018, the contractor, Dr. Paul Nickens, and the Staff held webinars and teleconference calls to discuss the survey methodology with the invited

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[15] *See* Letter from Cinthya I. Román, Chief, Environmental Review Branch, NRC, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Mar. 16, 2018) (ML18075A499) (March 2018 Approach), Encl. 1 – Timeline for NRC Staff's Approach for Obtaining Information on Lakota Sioux Cultural Resources Potentially Impacted by the Dewey-Burdock ISR Project (Mar. 16, 2018) (ML18075A502) (Timeline).

[16] Staff Motion, Attach. 1, Statement of Facts at 10-11.

[17] *See* March 2018 Approach at 2; *id.,* Encl. 1, Timeline.

[18] See *Oglala Sioux Tribe's Response to NRC Staff's March 16, 2018 Cultural Resources Survey Proposal* (Mar. 30, 2018), at 1 (Tribe's Response to March 2018 Approach); Letter from John Mays, Chief Operating Officer, Powertech USA, Inc., to Cinthya I. Román, Chief, Environmental Review Branch, NRC (Apr. 11, 2018), at 1 (unnumbered) (ML18101A223).

[19] Staff Motion, Attach. 1, Statement of Facts at 15-18.

Tribes.[20] During a June 5 teleconference, Dr. Nickens presented a proposed work plan and requested comments from the Tribes.[21]

On June 8, however, counsel for the Tribe informed the Staff that the Tribe would not participate in the field survey scheduled to start on June 11.[22] On June 12, the Tribe provided the Staff and Dr. Nickens with a document entitled "Discussion Draft – Cultural Resources Survey Methodology" (June 12 Discussion Draft), which proposed numerous additions to Dr. Nickens's proposed survey methodology.[23] The June 12 Discussion Draft proposed bringing several dozen tribal elders, spiritual leaders, warrior society leaders, and technical staff to visit the site over several days in each of the seasons of the year and a field survey performed at 10-meter intervals throughout the site (approximately 10,500 acres).[24] These additions would cause the survey to take more than a year to complete and, by the Tribe's estimate, cost over $2 million to perform.[25] On June 13, 2018, the Tribe held an emergency meeting of its Cultural Affairs and Historic Preservation Advisory Council to discuss the survey methodology, with the NRC Staff and Dr. Nickens in attendance.[26] The Tribe provided an updated "discussion draft"

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[20] *See id.*, Attach. 1, Statement of Facts at 17; *see also* Summary of NRC Webinar and Teleconference Call Sessions to Discuss Survey Methodology for the Dewey-Burdock In Situ Uranium Recovery (ISR) Project (June 29, 2018) (ML18164A241) (Summary of Survey Methodology Sessions). Although other Tribes were invited to participate, only the Oglala Sioux Tribe participated on June 1 and 4. *Id.* at 1. On the June 5 teleconference, the Rosebud Sioux Tribe participated, along with the Oglala Sioux Tribe. *Id.*

[21] *See* Staff Motion, Attach. 1, Statement of Facts at 18; *see also* "Proposed Initial Work Plan for Phase 1 Tribal Field Survey at the Dewey-Burdock ISR Project Area, June 11-22, 2018" (ML18157A092).

[22] *See* Email from Travis Stills, Oglala Sioux Tribe Counsel, to Diana Diaz-Toro, Project Manager, NRC (June 8, 2018) (ML18159A585).

[23] *See* LBP-18-5, 88 NRC at 119-21.

[24] *See id.*

[25] *Id.* at 121.

[26] Staff Motion, Attach. 1, Statement of Facts at 21.

on June 15, 2018 (June 15 Discussion Draft), which, in addition to the conditions stated in the June 12 Discussion Draft, also called for examining areas over 20 miles from the Dewey-Burdock site.[27] The June 15 Discussion Draft further stated that the Tribe was aware that the Staff expected the budget to be much lower than the Tribe's proposal and that it was "now NRC's task to either accept the [Tribe's] proposal or to propose an approach that limits the [Tribe's] proposed survey methodology to meet what NRC considers a reasonable budget."[28]

Soon afterwards, the Staff informed the Tribe that it was discontinuing survey efforts.[29] Counsel for the Staff explained via email that the Tribe's proposal was "far apart . . . from what the staff expected" preparing for the first phase of the survey and that it represented "structural differences, rather than minor details that could be promptly resolved" before the second week of the scheduled phase one survey.[30] Staff counsel stated that Staff was not prepared to continue to incur day-to-day costs at the site and considered it necessary to discontinue the activities scheduled for the following week.[31]

The Tribe disagreed with the Staff's decision to terminate all field work.[32] During the June 15 email exchange, counsel for the Tribe claimed that the plan Dr. Nickens had presented in the webinars was simply an "open site survey," to which the Tribe had long objected and which included "no plan for protecting the Tribes' confidential cultural resources information."[33]

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[27] *Id.*, Attach. 1, Statement of Facts at 21-22.

[28] LBP-18-5, 88 NRC at 121.

[29] *See* Email exchange between Emily Monteith, NRC Staff Counsel, and Travis Stills, Oglala Sioux Tribe Counsel (June 15, 2018), at 2 (unnumbered) (ML18173A266) (Email Exchange).

[30] *Id.* at 1, 2 (unnumbered).

[31] *Id.* at 1 (unnumbered).

[32] *Id.*

[33] *Id.* at 3 (unnumbered). The Board explained that the term "open site survey" has been used throughout the proceeding to mean "a survey 'where there is no support from NRC staff or

The Tribe stated that, nonetheless, progress had been made toward "a viable survey methodology."[34] The Tribe's counsel also stated that the Tribe was prepared to continue with a planned "windshield tour" and fieldwork scheduled for the second week of phase one.[35] Despite the Tribe's response, the fieldwork remained discontinued.

C. The Staff's Motion

On August 17, 2018, the Staff moved a second time for summary disposition of Contention 1A and argued that the Staff had done all that it reasonably could to remedy the NEPA deficiencies identified by the Board in LBP-15-16. Therefore, the Staff argued, the information should be deemed "not reasonably available" as described by Council on Environmental Quality (CEQ) regulations:[36]

> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant … the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[37]

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contractor . . . [a]nd it is essentially opening the site to the tribes to go out and do what they will do and be totally responsible for providing all the data and the analysis with no set protocol or methodology.'" LBP-18-5, 88 NRC at 116-17 (quoting Tr. at 1431 (Apr. 6, 2018)).

[34] Email Exchange at 3 (unnumbered).

[35] *Id.* at 1 (unnumbered).

[36] Staff Motion at 33-34.

[37] 40 C.F.R. § 1502.22. Although CEQ regulations do not bind the NRC, we give their regulations substantial deference, subject to certain conditions. *See* 10 C.F.R. § 51.10(a); *see also Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.10 (2007).

The Staff acknowledged in its motion that no new cultural resources information had been obtained.[38] The Staff maintained that the March 2018 Approach was reasonable because it included the elements that the Tribe had previously identified as necessary for a sufficient survey, including involving other tribes, hiring a qualified contractor, involving tribal elders, and providing two opportunities to view the site.[39] The Staff argued that the cost to obtain more complete information with the Tribe's help would be exorbitant due to the Tribe's conditions set forth in the June 12 Discussion Draft and June 15 Discussion Draft.[40] It argued that the Tribe's discussion drafts constituted constructive repudiation of the previously agreed-upon March 2018 Approach.[41] Therefore, the Staff argued that obtaining the Tribe's cooperation to identify additional cultural resources was not reasonably feasible.[42]

Powertech filed a brief in support of the Staff's motion, and the Tribe both opposed the Staff's motion and filed a cross-motion for summary disposition.[43]

In opposing the Staff's Motion, the Tribe argued that the Staff never prepared a scientific methodology as contemplated by the March 2018 Approach.[44] According to the Tribe, Dr. Nickens's proposed methodology amounted to an "open site survey," which the Tribe has

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[38] Staff Motion at 15.

[39] *Id.* at 18-24.

[40] *Id.* at 13, 17-35.

[41] *Id.* at 16, 29-33.

[42] *Id.* at 33.

[43] *Powertech (USA) Inc.'s Response in Support of NRC Staff Motion for Summary Disposition of Contention 1A* (Aug. 31, 2018); *Oglala Sioux Tribe's Response in Opposition to NRC Staff's Motion for Summary Disposition of Contention 1A* (Sept. 21, 2018) (Tribe Response); *Oglala Sioux Tribe Motion for Summary Disposition* (Aug. 17, 2018) (Tribe Motion for Summary Disposition).

[44] Tribe Response at 5-6.

repeatedly rejected as inadequate and unscientific.[45] The Tribe claimed that during the June 5, 2018, teleconference, Dr. Nickens acknowledged that the survey was "not the type of approach he would recommend."[46] The Tribe maintained that its discussion drafts were intended "to facilitate the discussions" about the type of methodology to use, and that it had expected the NRC Staff to "continue working on the methodology" instead of abruptly discontinuing field activities.[47]

The Tribe, in its own motion for summary disposition, argued that the Staff had abandoned its attempts to comply with NEPA.[48] It therefore renewed its request for the Board to "vacate the license and remand the matter to the NRC Staff to comply with NEPA."[49] It also argued that, in the alternative, the Board "should vacate [Powertech's] license, enter a final decision in the Tribe's favor on Contention 1A, and dismiss Powertech's license application."[50]

D. The Board's Ruling in LBP-18-5

The Board rejected both motions for summary disposition and found that there were material facts in dispute that could not be resolved without an evidentiary hearing.[51] With respect to the Staff's motion, the Board recognized that had the March 2018 Approach been

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[45] *See* Tribe Response, Attach., "Declaration of Kyle White" (Sept. 21, 2018), at 6-7 (White Declaration). Mr. White is the Director of the Oglala Sioux Tribe's Natural Resources Regulatory Agency and its Acting Tribal Historic Preservation Officer. *Id.*, Attach., White Declaration at 1.

[46] *Id.*, Attach., White Declaration at 7. This statement is not included in the Summary of Survey Methodology Sessions, but that summary does not purport to be a verbatim transcript of the participants' statements.

[47] *Id.*

[48] Tribe Motion for Summary Disposition at 9.

[49] *Id.* at 10.

[50] *Id.*

[51] LBP-18-5, 88 NRC at 100, 133-34.

carried out, it might well have satisfied NEPA's hard look requirement.[52] The Board found that all parties had accepted the March 2018 Approach as reasonable by the time the contractor began its survey in June 2018.[53] The Board also found that the approach attempted to address each of the Tribe's concerns, including hiring a qualified contractor, involving other Lakota Sioux Tribes, providing iterative opportunities to view the site, involving tribal elders, and using a scientific methodology.[54] But the Board held that although the March 2018 Approach "could constitute a valid path for resolving Contention 1A," there was still a factual dispute over whether the Staff had acted reasonably in its attempts to implement that approach.[55] Therefore, it could not grant summary disposition in the Staff's favor.

Specifically, the Board found that the reasonableness of Dr. Nickens's proposed survey methodology was a material fact in dispute.[56] The Board noted that the March 2018 Approach did not stipulate a survey methodology but called for the contractor and the Tribe to agree on an appropriate methodology before the field survey.[57] In addition, the Board found a question of fact concerning the reasonableness of the Staff's decision to discontinue efforts to implement the March 2018 Approach.[58] The Board noted that the Staff could have conducted other planned aspects of the March 2018 Approach, such as conducting interviews with tribal elders, while it continued to work with the Tribe to identify an acceptable methodology.[59] The Board

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[52] *Id.* at 126.

[53] *Id.* at 111.

[54] *Id.* at 112-19.

[55] *Id.* at 100.

[56] *Id.* at 130.

[57] *Id.* at 126.

[58] *Id.* at 132-34.

[59] *Id.* at 133.

concluded that a material fact remained in dispute regarding whether the Staff's decision not to implement the March 2018 Approach—or any other approach—was reasonable.[60] Therefore, the Board found that material factual disputes existed regarding the Staff's explanation that the information is "not reasonably available."[61]

The Board also found that the material factual dispute about the reasonableness of the Staff's actions likewise precluded it from granting summary disposition to the Tribe.[62]

The Board concluded that the Staff had two choices: either resume implementation of the March 2018 Approach or prepare for another evidentiary hearing.[63] The Board observed that the Tribe had agreed to the timeframes for the survey, that is, two phases of two weeks each.[64] The Board cautioned the Tribe that, if the Staff chose to move forward with the survey, "the *only* aspect of the Approach that is open for discussion is the site survey methodology."[65] Therefore, "any tribal negotiating position or proposal should *only* encompass the specific scientific method that would fit into the two week periods set out in the March 2018 Approach."[66] The Board stated that if the Staff were to choose to go to evidentiary hearing, then the Staff must show that the March 2018 Approach "contained a reasonable methodology," that the Staff acted reasonably in discontinuing all work, and that the Tribe's proposed alternatives were cost

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[60] *Id.* at 128.

[61] *Id.* at 129-30. Despite the Board's section heading, the Board concluded here that summary disposition at this time would be "wholly inappropriate," due to the existence of material factual disputes.

[62] *Id.* at 130.

[63] *Id.* at 134-35.

[64] *Id.* at 136.

[65] *Id.* at 135.

[66] *Id.* at 135.

prohibitive.[67] The order concluded with a schedule for an evidentiary hearing that would take place in late February 2019 and an instruction for the Staff to notify the Board of its choice by November 30, 2018.[68] The Staff initially chose to continue to work toward implementing a new survey of the site.[69]

On February 15, 2019, Staff provided the Tribe with another proposal for survey methodology.[70] The parties met on February 22, 2019, to further negotiate the proposed survey methodology within the limitations set by the Board in LBP-18-5.[71] During a subsequent teleconference with the Board, the Staff stated that the February 22 negotiation was not productive and that it planned to file a motion requesting a schedule for an evidentiary hearing on the reasonableness of the Staff's February 22, 2019, proposal.[72] The Board granted the Staff's motion and scheduled a hearing on this issue for August 28-30, 2019.[73]

II. DISCUSSION

A. Standard for Interlocutory Review

A ruling denying a motion for summary disposition is an interlocutory decision, and we generally disfavor interlocutory review.[74] Our rules of procedure allow interlocutory review only

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[67] *Id.* at 136.

[68] *Id.* at 139.

[69] *See* Letter from Lorraine Baer, NRC Staff Counsel, to Administrative Judges (Nov. 30, 2018) (ML18334A295).

[70] *See* Proposed Draft Cultural Resources Site Survey Methodology For the Dewey Burdock *In-Situ* Uranium Recovery Project in Fall River and Custer Counties, South Dakota (Feb. 15, 2019) (ML19046A443).

[71] Tr. at 1563.

[72] Tr. at 1563-65, 1619-21; *see Motion to Set Schedule for Evidentiary Hearing* (April 3, 2019).

[73] Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (unpublished).

[74] *See* CLI-18-7, 88 NRC at 6.

where the party requesting review can show that it is threatened with "immediate and serious irreparable impact" or the board's decision "affects the basic structure of the proceeding in a pervasive and unusual manner."[75]

Powertech acknowledges that its petition addresses a non-final Board decision and is therefore interlocutory, but it asserts that it can meet our standard for interlocutory review.[76] Powertech argues that the Board "committed legal error with pervasive effect" when it found that there was still a genuine issue of material fact in the litigation and when it found that the Staff had not shown that further Native American cultural resources information is "unavailable" as that term is used in CEQ regulations. It argues further that these errors will cause Powertech immediate and irreparable harm.[77]

B. Powertech Has Not Met the Standard for Interlocutory Review

1. Irreparable Harm

Powertech claims that the "series of erroneous decisions" by the Board have "prolonged" the proceeding with "no end in sight."[78] Powertech argues that, as long as the proceeding drags on, Powertech cannot start operations and generate income, and it is increasingly difficult for Powertech to raise investment capital.[79] Therefore, Powertech claims that it will suffer immediate and irreparable harm in the form of financial collapse.

We are not persuaded by this argument. We have rejected claims that delay constitutes immediate and irreparable harm that warrants our interlocutory review.[80] We have also

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[75] *Id.*; *see also* 10 C.F.R. § 2.341(f)(2)(i)-(ii).

[76] Petition at 6.

[77] *See id.* at 2.

[78] Petition at 16.

[79] *Id.* at 17-18.

[80] *See* CLI-18-7, 88 NRC at 7.

specifically rejected unsubstantiated claims that risks to a licensee's "credit rating, ability to obtain financing and ability to carry on its work" constituted irreparable harm.[81] Aside from the assertions in its petition, Powertech's claims are not supported by any evidence, such as affidavits or declarations.

2. Pervasive and Unusual Effect on the Structure of the Proceeding

Powertech next argues that the Board "committed legal error with pervasive effect" in its rulings[82] and therefore affected the "basic structure of the proceeding in a pervasive and unusual manner."[83] We have found such an effect in rare situations, as where a board splits a proceeding among two boards or admits a contention conditionally.[84] We have found no examples, however, where we took interlocutory review on the bases Powertech argues here and Powertech has not provided any examples.

a. Protracted Litigation

Powertech argues that the Board's decision will affect this proceeding in a pervasive manner by prolonging it indefinitely.[85] Elsewhere in its petition, Powertech argues that if the Tribe can create a material issue of fact simply by "chang[ing] its perspective at . . . will," the

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[81] *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133-36 (2009) (rejecting the argument that "truly exceptional delay or expense," resulting from contention potentially requiring production of thousands of documents, constituted "irreparable harm" warranting interlocutory review).

[82] Petition at 2, 20-22.

[83] 10 C.F.R. § 2.341(f)(2)(ii).

[84] *See, e.g.*, *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (conditional dismissal of contention); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 (2002) (decision to adjudicate construction permit separately from operating permit); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998) (establishment of separate board for different contentions).

[85] Petition at 20-21.

proceeding could never come to a conclusion.[86] But Powertech supplies no example in our case law where we have found that protracted litigation in itself provides grounds for our immediate review. In fact, we have specifically rejected such arguments in the past.[87] Indeed, prolonging litigation is a likely result when a board denies a motion for summary disposition.

Moreover, while we do not need to decide whether "indefinite" litigation warrants interlocutory review as a "pervasive and unusual effect," we find that this case does not present that scenario. The challenged Board ruling did *not* find that the proceeding would continue until the Tribe's cooperation was finally secured—it found only that the reasonableness of the Staff's efforts was still in dispute.[88]

The Board's ruling did not give the Tribe free reign to change its perspective, as Powertech claims. The Board stated that the Tribe was bound by the terms it had agreed to in accepting the March 2018 Approach, including the two two-week periods allotted to accomplish the survey.[89] We also observe that summary disposition is not the only option for ending this proceeding. The Board was prepared to proceed to an evidentiary hearing to establish whether further cultural resources information was reasonably obtainable. That hearing occurred in August 2019.

b. Claim that the Board Overstepped its Role

Powertech also argues that the Board's ruling alters the structure of the proceeding in a pervasive and unusual manner in that it "appears . . . to dictate the terms of satisfaction of

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[86] *Id.* at 16.

[87] *See, e.g.*, *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001).

[88] LBP-18-5, 88 NRC at 130-34.

[89] *Id.* at 135-36.

Contention 1A."[90] Powertech argues that the Board apparently will accept nothing "short of implementation of the March 2018 Approach as dispositive" of the contention.[91]

It is well-established that a Board has no authority to direct the manner in which the Staff conducts its safety and environmental reviews,[92] and we do not find that the Board inappropriately dictated the Staff's non-adjudicatory activities. The question of whether NEPA could be satisfied through an approach other than the March 2018 Approach was not before the Board. The Staff's Motion for Summary Disposition did not ask the Board to sanction some alternative approach for gathering cultural resources information. And the Board's decision suggested that an alternative approach might work as well to gather information about cultural resources.[93] In addition, the Board had no role in the development of the March 2018 Approach. The Staff proposed the approach, and Powertech and the Tribe agreed to it; Powertech's own petition for review acknowledges that it agreed to the March 2018 Approach.[94] And there were details still to be worked out within that approach—the survey methodology—that the Board did not purport to dictate or disturb. Therefore, we do not find that the Board has dictated the Staff's non-adjudicatory activities.

3. Novelty of Issue

Powertech further argues that the Commission should take review because "historic and cultural resources in NEPA processes present a novel issue that warrants Commission

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[90] Petition at 21.

[91] *Id.*

[92] *See* CLI-16-20, 84 NRC at 250; *Entergy Nuclear Operation, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 n.70 (2011); *Shaw Areva MOX Services*, CLI-09-2, 69 NRC at 63.

[93] *See* LBP-18-5, 88 NRC at 127 ("The NRC Staff has not implemented the mutually agreed-upon March 2018 Approach or any alternative approach ….").

[94] Petition at 4.

review."[95] Our regulations provide that a presiding officer (or board) may refer a ruling to the Commission for immediate review if *in the presiding officer's judgment*, the ruling presents "significant and novel legal or policy issues."[96] And a party may request that the board certify a ruling for our immediate review.[97] We may also take review on our own initiative. But as the case Powertech cites for the Commission's authority to take review points out, a petitioner may not solicit Commission review on that basis.[98] Therefore, Powertech's request is procedurally improper.

Moreover, Powertech does not explain why it would be advantageous for the Commission to take review at this point in the litigation as opposed to waiting until the litigation is complete and the record fully developed. Powertech argues that this proceeding, in addition to another *in situ* uranium recovery project case posing similar cultural resources issues, poses "unique challenges for the Commission and NRC Staff to develop a uniform policy for addressing both NHPA and associated NEPA reviews."[99] However, we are not convinced that the creation of a uniform policy regarding cultural resources would benefit from our involvement before the Board issues a final ruling.

While we do not find that Powertech's concerns related to duration meet our high standards for interlocutory review, we are mindful of these considerations. As noted above, the Staff has now elected to terminate this adjudication through an evidentiary hearing, and the

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[95] *Id.* at 23.

[96] 10 C.F.R. § 2.323(f)(1).

[97] *Id.* § 2.323(f)(2).

[98] Petition at 7 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000)); *see also Haddam Neck*, CLI-01-25, 54 NRC at 374-75; *Indian Point*, CLI-09-6, 69 NRC at 138 (Commission will not entertain requests from a party that we take review in the exercise of our inherent supervisory authority).

[99] Petition at 23.

Board has established a schedule to complete this adjudication in the coming months.[100] We anticipate that the Board will use the available case management tools to close this proceeding consistent with the established schedule.[101] We also expect the parties to support the Board in reaching this goal.[102]

To further these objectives, we offer the following observation. To clarify our stance on 40 C.F.R. § 1502.22, the Board suggests that we previously accepted "the procedural requirements included in section 1502.22(b), so their applicability in these circumstances continues to be appropriate" for addressing a situation where the agency has incomplete or unavailable information in the NEPA context.[103] On the contrary, we have recently reiterated that as an independent regulatory agency we are not bound by section 1502.22 and reformulated a contention to remove references to that regulation's requirements for developing a NEPA analysis when information was incomplete or unavailable.[104] Rather, we have consistently directed the Staff to undertake reasonable efforts to obtain unavailable information.[105] As Chairman Svinicki noted in her earlier dissent in this proceeding, section 1502.22 can be a useful guide in determining what is reasonable, but it is not controlling.[106] To the extent the Board has focused its analysis on whether the Staff advanced a reasonable

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[100] Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (establishing November 29, 2019, as the deadline for a decision from the Board).

[101] *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 20-21 (1998).

[102] *Id.* at 21-22.

[103] LBP-18-5, 88 NRC at 129 (citation omitted).

[104] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438, 444 (2011).

[105] *Entergy Nuclear Generation Company and Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208-09 (2010).

[106] CLI-16-20, 84 NRC at 264 & n.7 (Svinicki, dissenting in part).

proposal to conduct the survey and whether its determination to discontinue the survey was reasonable, we do not see a legal error with respect to section 1502.22. We offer this clarification to prevent overreliance on section 1502.22 throughout the remainder of this adjudicatory proceeding.

III. CONCLUSION

For the foregoing reasons, we deny review of the Board's decision in LBP-18-5.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of September 2019.

Additional Views of Chairman Svinicki

Today's ruling marks the third time in four years the Commission has entered an order regarding Contention 1A in this proceeding. When the Commission initially upheld the Board's determination to admit Contention 1A, in CLI-16-20, I dissented.[1] I found that the Board insufficiently addressed the Staff's claim that it met the National Environmental Policy Act's (NEPA) requirement to undertake reasonable efforts to obtain the information on cultural resources that Contention 1A asserted was lacking.[2] Subsequently, I joined the majority in rejecting Powertech's appeal from a Board order denying summary disposition on Contention 1A in CLI-18-07.[3] However, I again wrote separately to emphasize that while I found our standards for interlocutory appeal unmet, my views on the admissibility of Contention 1A were unchanged.[4]

Regarding the current appeal, I agree with the majority that Powertech's filing falls short of our high standards for interlocutory review. Nonetheless, I continue to believe that a stricter application of NEPA at the time of contention admissibility may have saved the agency many years of litigation. As I observed in my previous additional views accompanying CLI-18-07, the order upheld in CLI-16-20 led to an unworkable adjudicatory proceeding resulting in now three years of adjudicatory delay.[5] That delay, and associated expense, forms the basis for much of Powertech's instant appeal. While I concur with the majority that the Commission has not historically found concerns related to delay and expense sufficient to warrant interlocutory

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[1] CLI-16-20, 84 NRC 219 (2016).

[2] *Id*. at 263-64.

[3] CLI-18-07, 88 NRC 1 (2018).

[4] *Id*. at 11.

[5] *Id*.

review, Powertech's appeal illustrates to me that extreme cases of adjudicatory delay might. Nonetheless, as the majority observes, the parties are now pursuing an evidentiary hearing that should complete this proceeding in the coming months. I join the majority in offering my expectation that the Board and parties will work together to meet the established schedule.

Additional Views of Commissioner Baran

While I agree with the Commission's decision to deny review of the Board's conclusions in LBP-18-5, I write separately because I do not believe the "observation" about the NRC Staff's compliance with the National Environmental Policy Act made in the final paragraph of II.B.3. is necessary to reach a decision in this case. My agreement with the overall decision should not be read as an endorsement of this unnecessary dicta.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-19-09)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
COMMISSION MEMORANDUM AND ORDER (CLI-19-09)

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[Original signed by Wendy Moore]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of September 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright
Christopher T. Hanson

In the Matter of POWERTECH (USA) INC. (Dewey-Burdock *In Situ* Uranium Recovery Facility)	Docket No. 40-9075-MLA

CLI-20-09

MEMORANDUM AND ORDER

On December 12, 2019, the Atomic Safety and Licensing Board issued its Final Initial Decision in this proceeding on Powertech (USA) Inc.'s (Powertech) application for an *in situ* uranium recovery license for the Dewey-Burdock site in South Dakota.[1] The Oglala Sioux Tribe (Tribe) and a group of individuals and organizations referred to as the "Consolidated Petitioners" (together, Petitioners) seek review of the Board's decision as well as two interlocutory Board orders.[2] In LBP-19-10, the Board ruled that the NRC Staff had fulfilled its responsibilities under the National Environmental Policy Act (NEPA) to characterize cultural resources at the

[1] LBP-19-10, 90 NRC 287 (2019).

[2] *Oglala Sioux Tribe's Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Jan. 21, 2020) (Tribe Petition); *Consolidated Intervenors Petition for Review of LBP-19-10, LBP-17-09 and Board Ruling on Motion to Strike* (Jan. 21, 2020) (Consolidated Intervenors Petition)

proposed site using reasonably available information. For the reasons described below, we decline to review the challenged decisions.

I. BACKGROUND

A. Procedural History

In 2010, Petitioners sought and were granted a hearing in this proceeding on several contentions.[3] In 2015, after an evidentiary hearing, the Board ruled in favor of the Staff and Powertech with respect to all contentions except for Contentions 1A and 1B.[4] With respect to Contention 1A, the Board ruled that the Staff had not fulfilled its responsibilities under NEPA to assess the proposed facility's impacts on cultural resources because an adequate cultural resources survey of the site had not been performed.[5] In so holding, the Board pointed to the Staff's testimony that identifying cultural resources of significance to Native American tribes would require the tribes' participation.[6] With respect to Contention 1B, the Board held that the Staff had not adequately consulted with the Tribe as required by the National Historic Preservation Act (NHPA).[7] The Board's decision left the license in place while the Staff worked to remedy the NEPA and NHPA violations. The Staff and Powertech petitioned for review of the Board's ruling on both contentions as did the Tribe and Consolidated Intervenors (with respect

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[3] *See* LBP-10-16, 72 NRC 361 (2010).

[4] *See* LBP-15-16, 81 NRC 618, 653-57 (2015).

[5] *Id.* at 655.

[6] *Id.* at 653-54.

[7] *Id.* at 655-57; *see* 54 U.S.C. §§ 300101-307108.

to the remedy offered).[8] We denied all four petitions with respect to the Board's ruling and remedy for Contentions 1A and 1B.[9]

Following the Board's ruling, the Staff resumed its efforts to consult with the Tribe and to arrange for additional surveys of the Dewey-Burdock site with the Tribe's participation.[10] After two years of efforts to coordinate an additional cultural resources survey with the Tribe, the Staff concluded that further consultation would be fruitless and moved for summary disposition of Contentions 1A and 1B. In LBP-17-9, the Board ruled that the Staff had fulfilled its obligations to consult with the Tribe and granted summary disposition of Contention 1B. But the Board found, with respect to Contention 1A, that there was still a material question of fact concerning the reasonableness of the Staff's efforts to characterize cultural resources at the site.[11] We declined to review the Board's decision at that time because the ruling was not final.[12]

The Staff again resumed its efforts to organize a site survey with the Tribe's participation. On March 16, 2018, the Staff sent the Tribe a revised proposal for identifying historical, cultural, and religious resources on the site (March 2018 Approach).[13] The Staff understood that it had the Tribe's agreement to participate in the March 2018 Approach, and it hired a contractor and provided representatives to participate in the survey in mid-June 2018.[14] On June 12, 2018 and June 15, 2018, however, the Tribe sent the Staff proposals containing

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[8] *See* CLI-16-20, 84 NRC 219 (2016).

[9] *Id*. at 242-51.

[10] *See* LBP-17-9, 86 NRC 167, 179-83 (2017).

[11] *See id*. at 194-201.

[12] CLI-18-7, 88 NRC 1 (2018).

[13] Ex. NRC-192, Letter from Cinthya I Román, NRC to Trina Lone Hill, Oglala Sioux Tribe (Mar. 6, 2018) (ADAMS accession no. ML18075A499) (March 2018 Approach).

[14] *See* LBP-18-5, 88 NRC 95, 116-23 (2018).

additional conditions for the Tribe's participation in the surveys.[15] The Tribe's June 2018 proposals would take over a year to complete and cost more than $2 million.[16] The Staff viewed these counterproposals as "fundamentally incompatible" with the March 2018 Approach, and on June 15, 2018, it discontinued efforts to survey the site.[17]

The parties then filed cross-motions for summary disposition, both of which the Board denied.[18] The Board explained that because the Staff had not adequately identified Native American cultural resources on the site, in order to comply with NEPA the Staff would have to show that the information was "not reasonably available" under 40 C.F.R. § 1502.22, a Council on Environmental Quality (CEQ) regulation.[19] In LBP-19-10, the Board noted that the NRC is not bound by this regulation, but nonetheless such regulations can serve as guidance in carrying out our NEPA responsibilities:

> CEQ regulations generally are not controlling on the NRC, at least to the extent that they have not been incorporated by the agency into 10 C.F.R. Part 51, and the unadopted provisions of 40 C.F.R. § 1502.22 are not binding on the NRC Staff in this case. Nevertheless, the Commission has recognized that such CEQ regulations can be useful guides for determining what actions are reasonable under NEPA.[20]

Consistent with our case law and past practice, we consider this regulation as guidance.[21]

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[15] *See id.* at 119-21.

[16] *See id.* at 120-21.

[17] Ex. NRC-200, Letter from Cinthya I. Román, NRC, to Kyle White, Oglala Sioux Tribe (July 2, 2018) (ML18183A304).

[18] *See* LBP-18-5, 88 NRC at 130-32.

[19] *Id.* at 128-29.

[20] LBP-19-10, 90 NRC at 339 (internal citations omitted).

[21] *See, e.g.*, *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011).

In LBP-18-5, the Board considered various elements of the March 2018 Approach and found that if the Staff had implemented that approach, its duty to take a "hard look" at cultural effects "might well have been satisfied."[22] But the Board held that there remained a question whether the Staff's decision to discontinue all efforts to follow that approach was reasonable. It held that the parties could either continue their efforts to agree on a survey, or they could proceed to a second evidentiary hearing on the following questions: (1) whether the March 2018 Approach contained a reasonable methodology for the conduct of the site survey; (2) whether the Staff's decision to discontinue all work on June 15, 2018, was reasonable; and (3) whether the Tribe's proposed alternatives to the March 2018 Approach were cost-prohibitive.[23] We denied Powertech's request for interlocutory review of the Board's ruling.[24]

The Staff elected to continue its efforts to conduct a survey with the Tribe's cooperation and developed a plan that the Board refers to as the February 2019 Methodology.[25] On February 22, 2019, the Staff met with the Oglala Sioux Tribal Historic Preservation Officer (THPO) and with THPOs from the Standing Rock, Rosebud, and Cheyenne River Sioux Tribes at the Pine Ridge Reservation in South Dakota.[26] After discussions again broke down, the Staff determined that it would not be able to reach an agreement with the Tribe and elected to proceed to a second evidentiary hearing.[27]

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[22] LBP-18-5, 88 NRC at 126.

[23] *Id.* at 136.

[24] CLI-19-9, 90 NRC 121 (2019).

[25] *See* LBP-19-10, 90 NRC at 306-10; Ex. NRC-214, Proposed Draft Cultural Resources Site Survey Methodology (Feb. 2019) (ML19058A153) (February 2019 Methodology).

[26] *See* LBP-19-10, 90 NRC at 308.

[27] *Motion to Set Schedule for Evidentiary Hearing* (Apr. 3, 2019).

In April 2019, the Board granted the Staff's motion for a hearing on "the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable."[28] That is, the Board limited the scope of the hearing to whether the Staff had shown that the information on cultural resources was not reasonably available to the Staff under NEPA.

The NRC Staff filed an initial position statement and exhibits on May 17, 2019.[29] On July 17, the Staff filed reply testimony.[30] On August 2, 2019, the Tribe filed a motion to strike the Staff's prefiled testimony and exhibits in whole or in part.[31] The Board denied the Tribe's motion in an unpublished order on August 12, 2019.[32]

The hearing took place in Rapid City, South Dakota on August 28 and 29, 2019.

B. Board Decision in LBP-19-10

In LBP-19-10, the Board found that the Staff's proposals in the March 2018 Approach and the February 2019 Methodology were reasonable.[33] The Board noted that the Staff's approaches satisfied all five features the Tribe had described in May 2017 as important to an adequate survey, namely: "(1) hiring a qualified contractor; (2) involving other Tribes; (3)

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[28] Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (unpublished) (Order Granting Hearing).

[29] *NRC Staff's Initial Statement of Position on Contention 1A* (May 17, 2019); Ex. NRC-176, Prefiled Direct Testimony of NRC Staff (May 17, 2019) (refiled on May 21, 2019, as NRC-176-R) (ML19242C185).

[30] Ex. NRC-225, NRC Staff's Prefiled Reply Testimony (July 17, 2019) (ML19242C236).

[31] *See Oglala Sioux Tribe's Motion to Strike* (Aug. 2, 2019) (Motion to Strike).

[32] Order (Denying Oglala Sioux Tribe Motion to Strike) (Aug. 12, 2019) (unpublished) (August 12, 2019, Order).

[33] LBP-19-10, 90 NRC at 318.

providing iterative opportunities for a site survey; (4) engaging Tribal elders; and, most critically, (5) conducting a site survey using scientific methodology in collaboration with the Tribes."[34]

The Board further found that the Tribe's lack of cooperation resulted in the cultural resources information being not reasonably available.[35] It held that the Tribe's "last-minute attempts in June 2018 to renegotiate fundamental elements of the March 2018 Approach" were not reasonable.[36] The Board noted that it had already found, in its 2018 ruling on the motions for summary disposition, that the Tribe's June 2018 counterproposal involved "expanding timeframes and exorbitant costs."[37] As a result, it found that the Staff's decision to discontinue its efforts to obtain the Tribe's participation was reasonable.[38] It concluded that the Staff had satisfied NEPA's requirements relating to unavailable information, guided by CEQ regulations, and that the Staff had therefore satisfied NEPA's requirement to take a "hard look" at environmental impacts.[39]

The Board further observed that there is an existing Programmatic Agreement that governs how Powertech will protect any cultural resources that it may encounter as it undertakes construction and operation of its facility.[40] Compliance with the Programmatic

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[34] *Id.* at 318-29; *see* Ex. NRC-190, Oglala Sioux Tribe May 31, 2017, Letter Responding to NRC's April 14, 2017, Letter, at 3-8 (ML17152A109).

[35] LBP-19-10, 90 NRC at 329-34.

[36] *Id.* at 335.

[37] *Id.* at 331 & n.227.

[38] *Id.* at 334-38.

[39] *Id.* at 338-41, 345-48.

[40] *Id.* at 341-45; *see also* Ex. NRC-018-A, Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties South Dakota (Mar. 19, 2014) (ML14246A421) (Programmatic Agreement).

Agreement is a condition of Powertech's license.[41] Among its provisions, the Programmatic Agreement requires that prior to commencing construction activities, Powertech will develop a monitoring plan and employ a qualified archeologist, with preference to employees of tribal enterprises, to serve as a monitor.[42] Citing the Staff's testimony, the Board amended the license to add a condition requiring that, prior to new construction activities, Powertech provide to the affected Tribes and signatories to the Programmatic Agreement thirty days advance notice of the identity of the monitor who will observe construction activities.[43]

Finally, the Board held that it was not necessary for the Staff to publish a supplement to its final supplemental environmental impact statement (FSEIS) for the project.[44] The Board relied on longstanding agency practice that a deficiency in an EIS identified during the hearing process can be rectified by the hearing record.[45]

The Tribe and the Consolidated Intervenors have sought review of LBP-19-10, the Board's summary disposition of Contention 1B (LBP-17-9) and its decision denying the Tribe's

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[41] *See* Ex. NRC-018-A, Programmatic Agreement, at 4 (Condition 1 (a)); *see also* LBP-19-10, 90 NRC at 341-42.

[42] *See* Ex. NRC-018-A, Programmatic Agreement, at 13 (Condition 13 (c)); *see also id.* at 10-11 (Condition 9).

[43] LBP-19-10, 90 NRC at 344-45; *see also* Tr. at 2037-42, 2047-51, 2075.

[44] LBP-19-10, 90 NRC at 348-49; *see* Exs. NRC-008-A-1 through NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities—Final Report," NUREG-1920 (supp. 4 Jan. 2014) (ML14246A350, ML14246A326, ML14246A327, ML14247A334) (FSEIS).

[45] LBP-19-10, 90 NRC at 350-52 (citing, among others, *NRDC v. NRC*, 879 F.3d 1202, 1209-12 (D.C. Cir. 2018) (upholding the agency practice of curing a deficiency in an EIS using the hearing record)).

motion to strike (August 12, 2019, Order).[46] The Staff and Powertech oppose the petitions for review.[47]

II. DISCUSSION

A. Standard of Review

We may grant review, in our discretion, where the petitioner raises a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.[48]

We show a high degree of deference to the Board as factfinder. Therefore, a petition claiming that the Board's findings of fact are "clearly erroneous" requires the petitioner to show that the Board's findings are "not even plausible in light of the record viewed in its entirety."[49]

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[46] *See* Tribe Petition, Consolidated Intervenors Petition.

[47] *NRC Staff's Answer Opposing Petitions for Review* (Feb. 13, 2020) (Staff Answer Opposing Review); *Brief of Powertech (USA), Inc. in Opposition to the Oglala Sioux Tribe's and Consolidated Intervenors' Petition for Review of LBP-19-10* (Feb. 18, 2020) (Powertech Answer Opposing Review); *see also Oglala Sioux Tribe's Reply to NRC Staff's Answer in Opposition to Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Feb. 24, 2020) (Tribe Reply to Staff); *Oglala Sioux Tribe's Reply to Powertech's Answer in Opposition to Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike* (Feb. 28, 2020) (Tribe Reply to Powertech).

[48] 10 C.F.R. § 2.341(b)(4).

[49] *Kenneth G. Pierce* (Sherwood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)); *see also In the Matter of David Geisen*,

We are highly deferential, "particularly where much of [the] evidence is subject to interpretation."[50] And we give the highest deference to findings of fact that turn on witness credibility.[51] We review the Board's legal rulings *de novo*, but we only take review, as explained in the regulation, where the petitioner shows that the Board's rulings on a substantial and important question of law is without precedent or contrary to precedent.[52] In addition, we defer to the Board in its procedural case management decisions.[53]

B. The Tribe's Petition for Review

1. Final Initial Decision: LBP-19-10

The Board's ruling in LBP-19-10 centers on the question of whether additional information on cultural resources is unavailable, or too costly to obtain. Although as an independent agency the NRC is not bound by CEQ regulations unless adopted into Part 51, we "look to [them] for guidance, including section 1502.22."[54] That regulation, which pertained to unavailable information, provided the following:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are

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CLI-10-23, 72 NRC 210, 224-25 (2010); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004).

[50] *Geisen*, CLI-10-23, 72 NRC at 225.

[51] *Id.*

[52] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 11 (2010).

[53] *Id.* at 47; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 629 (2004).

[54] *Diablo* Canyon, CLI-11-11, 74 NRC at 443-44.

> not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If the information relevant cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> (1) A statement that such information is incomplete or unavailable;
>
> (2) A statement of the relevance of the incomplete or unavailable information to evaluating the reasonably foreseeable significant adverse impacts on the human environment;
>
> (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and
>
> (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[55]

In promulgating the regulation, the CEQ stated that the "term 'overall costs' encompasses financial costs and other costs such as costs in terms of time (delay) and personnel."[56] Recently, the CEQ revised this regulation to replace "the term 'exorbitant' with 'unreasonable'" because 'unreasonable' is "consistent with CEQ's description of 'overall cost' considerations in

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[55] 40 C.F.R. § 1502.22.

[56] *See* Council on Environmental Quality, National Environmental Policy Act Regulations; Incomplete or Unavailable Information, Final Rule, 51 Fed. Reg. 15,618, 15,622 (Apr. 25, 1986).

its 1986 promulgation of amendments to this provision."[57] The CEQ's rulemaking reiterates that the term "overall cost" includes financial costs and other costs such as delay.[58]

a. Whether the Board Erred in Finding Additional Cultural Resources Information "Unavailable"

The Tribe raises several related challenges to the Board's factual finding that additional cultural resources information is not reasonably available.[59] First, the Tribe argues that it never agreed to the March 2018 Approach and that the approach was flawed.[60] The Tribe further asserts that the amount of compensation it was offered for its participation in the proposed survey was inadequate.[61] And it claims that the Staff's contractor did not have the required expertise to design and carry out an adequate cultural resources survey.[62] The Tribe also argues that it negotiated in good faith, whereas the Staff did not.[63]

The Board considered each of these arguments. With respect to whether the Tribe ever agreed to the March 2018 Approach, the Board found that the Tribe's THPO at the time, Trina Lone Hill, had agreed that the March 2018 Approach was reasonable but that Lone Hill's

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[57] *See* Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304, 43,332, 43,366 (Jul. 16, 2020). The revised regulation was also redesignated as § 1502.21. *See also* 51 Fed. Reg. 15,618 at 15,622 (stating that in using the term "overall costs" the CEQ "does not intend that the phrase be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the impacts, or to perform a cost-benefit analysis. Rather, it intends that the agency interpret "overall costs" in light of overall program needs").

[58] 85 Fed. Reg. at 43,332.

[59] Tribe Petition at 6-14, 15-17.

[60] *Id.* at 6-7.

[61] *Id.* at 8-9.

[62] *Id.* at 9-10.

[63] *Id.* at 10-13.

successor, Kyle White, withdrew the Tribe's agreement.[64] Moreover, the question before the Board was not whether the Tribe had agreed to the March 2018 Approach but whether the approach was reasonable.[65] In evaluating whether the approach was reasonable, the Board thoroughly discussed the five criteria that the Tribe had identified as necessary for a competent survey.[66] The Board's assessment of these factors reflects factual determinations that warrant deference.

The Board also discussed, at length, the parties' interactions on which it relied for its determination that the Tribe's lack of cooperation resulted in the unavailability of additional cultural resources information.[67] The Tribe has not shown that the Board's findings were implausible in light of the record as a whole.

The Tribe further argues that the Staff could have taken other steps to gather additional cultural resources information even if it had not completed a site survey, for example, through oral interviews.[68] It also argues that Staff could have procured information by hiring a competent contractor to perform a survey even without the Tribe's involvement.[69] And the Tribe argues that the information was available from tribal members, community members, and other Tribes.[70] But pursuing the Tribe's suggested options would have been a significant departure from the long path the Staff had taken in trying to resolve the Tribe's Contention 1A. These methods would not have satisfied all five criteria that the parties agreed would be necessary to

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[64] *See* LBP-19-10, 90 NRC at 330.

[65] *See* Order Granting Hearing at 4.

[66] LBP-19-10, 90 NRC at 318-29.

[67] *Id.* at 329-34.

[68] Tribe Petition at 15-16.

[69] *Id.* at 16-17.

[70] *Id.* at 17.

complete a satisfactory survey. The Board also discussed the Staff's reasons for not pursuing other information-gathering options that would not involve the Tribe and found that the Staff's decision was reasonable.[71]

We find that the Board's conclusion that the cultural resources information it found lacking in LBP-15-16 was not available due to the Tribe's non-cooperation was reasonable. The Tribe's arguments do not therefore show a clear error of fact in the Board's findings.

b. Need for FSEIS Supplementation

The Tribe argues that the Board erred in ruling that there was no need for the Staff to issue a supplement to the FSEIS.[72] According to the Tribe, without a supplement, the public does not have the opportunity to assess and comment on the Staff's finding that additional cultural resources information is unavailable.[73] Relatedly, it claims that the Board erred in denying its motion to strike the Staff's prefiled testimony.[74]

The Board relied on longstanding agency practice allowing the adjudicatory record to augment existing environmental analyses in considering whether the Staff should have to issue a supplement to the FSEIS.[75] The Board noted that federal courts of appeals cases have "accepted the validity" of the NRC's approach.[76] The Board also stated that in some situations

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[71] LBP-19-10, 90 NRC at 334-35.

[72] Tribe Petition at 14-15.

[73] *Id.* at 15.

[74] *Id.* The Tribe's argument is more fully explained in its Motion to Strike, where it asserted that any information not discussed or referenced in the FSEIS is not relevant or material and the Staff's attempts to "rehabilitate its FSEIS through post-hoc written testimony of witnesses . . . should be struck by the Board." Motion to Strike at 3.

[75] *See* LBP-19-10, 90 NRC at 350-53 (citing *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 595 (2016); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1013 (1973)).

[76] *Id.* at 351 & n.315 (citing *NRDC v. NRC*, 879 F.3d 1202, 1209-12 (D.C. Cir. 2018); *New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978); *Citizens for Safe*

publishing a supplemental environmental analysis would be appropriate, for example when the information developed during the adjudication represents a "fundamental . . . omission," where the "proposed project has been so changed by the Board's decision as not to have been fairly exposed to public comments during the initial circulation" of the FSEIS, or where the NRC Staff's evidence at hearing varies "markedly" from the information in the FSEIS.[77] It noted that our regulations in Part 51 require supplementation when the scope of the project has changed or there is significant new information.[78]

The Board also looked to 40 C.F.R. § 1502.22(b) and determined that all the elements of the CEQ regulation were met in its decision and the supporting record.[79] The Board observed that the original FSEIS stated that cultural resources information was limited in part because the Tribe, after initially agreeing to participate in the 2013 cultural resources survey, "withdrew its acceptance because the tribal council had not been briefed before the survey was scheduled to begin."[80] The Board found that because the Staff had not been able to conduct an additional cultural resources survey, the only potentially supplemental information was "the reasons why such additional cultural resources information still has not been obtained by the NRC Staff."[81] The Board concluded that a statement of "why this information was unavailable . . . does not

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Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974)).

[77] *Id.* at 352-53.

[78] *Id.* at 352 n.316 (citing 10 C.F.R. § 51.92).

[79] *See id.* at 340, 348-55.

[80] *Id.* at 354 (quoting FSEIS at F-2).

[81] *Id.*

appear to us to constitute the type of significant discussion that warrants employing the supplementation process."[82]

In its petition for review, the Tribe argues that it is improper for an environmental analysis to be augmented informally through the record of adjudication.[83] But the Tribe's arguments are insufficient to meet our standard for taking review; that is, they do not demonstrate to us that "a necessary legal conclusion [that the Board made] is without governing precedent or is a departure from or contrary to established law" or that the Board's decision raises a "substantial and important question of law, policy, or discretion."[84] It appears that in all respects the Board followed applicable law, both within our agency case law and federal court decisions.

The Tribe attempts to distinguish the Circuit Court for the District of Columbia's ruling in *NRDC v. NRC*, which rejected a challenge to our practice of augmenting an environmental analysis with the publicly available adjudicatory record.[85] The Tribe points out that in *NRDC v. NRC*, the analysis missing from the environmental document had been performed before the case had reached the court of appeals; therefore, remand to the agency for formal supplementation would be "pointless."[86] The Tribe argues that *NRDC v. NRC* is inapposite to this proceeding because no additional information has been gathered and no additional analysis has taken place.[87] In connection with this argument, the Tribe claims that the Board's August

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[82] *Id.* at 355.

[83] Tribe Petition at 14-15.

[84] *See* 10 C.F.R. § 2.341(b)(4).

[85] Tribe Petition at 14-15 (citing *NRDC v. NRC*, 879 F.3d at 1212).

[86] *Id.*

[87] *Id.*

12, 2019, ruling on its motion to strike also violates NEPA.[88] In its motion to strike Staff's prefiled testimony, the Tribe argued that the Staff was improperly trying to rehabilitate a deficient NEPA document with extraneous information.[89]

The Tribe does not raise a substantial question warranting our review because it misconstrues the purpose of the second evidentiary hearing. The Board and the parties knew at the outset of the hearing that no additional cultural resources information would be gathered in that process. The question before the Board was only whether the information was properly considered "unavailable" under NEPA. And under CEQ regulations, which we look to for guidance, "unavailable" information includes information the cost of which to gather would be "unreasonable" in terms of both money and time.[90] Therefore, we see no factual, procedural, or legal error in the Board's conclusion that the testimony it received at the hearing specifically convened for the purpose of determining whether information was unavailable eliminated the need for formal supplementation to the FSEIS to reflect that information's unavailability.

c. *Board License Amendment Concerning the Programmatic Agreement*

The Tribe raises three arguments with respect to the Board's license amendment concerning the Programmatic Agreement. The Tribe's arguments do not present an error warranting our review.

The Tribe first argues that the license condition was not "subject to notice and comment or otherwise incorporated into any NEPA document," so it cannot remedy a NEPA deficiency.[91]

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[88] *Id.*

[89] *See* Motion to Strike at 1-9.

[90] *See* 40 C.F.R. § 1502.21; *see also* Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. at 43,332.

[91] Tribe Petition at 18.

But as we have explained above, the FSEIS is properly augmented by the entire adjudicatory record, including the Board's decision. The Board appropriately found that no formal supplementation, including notice and comment, was necessary to comply with NEPA.

The Tribe additionally states that the Board's first initial decision in the case (LBP-15-16, which we affirmed in CLI-16-20) found the Programmatic Agreement to be insufficient to protect cultural resources.[92] It therefore argues that the Programmatic Agreement has been "invalidated by prior rulings."[93] But neither the Board decision in LBP-15-16 nor our decision affirming it found the Programmatic Agreement deficient for purposes for which it was entered, and those decisions did not invalidate the Programmatic Agreement.

We are not convinced by the Tribe's argument that because the Programmatic Agreement is "purely a creature of [the] NHPA," it has no role in satisfying NEPA.[94] The Tribe argues that the NHPA only protects sites eligible for inclusion within National Register of Historic Places; therefore, it asserts, "any cultural resources not eligible require no analysis under the NHPA or Programmatic Agreement, providing no basis to meet NEPA duties."[95] But the Programmatic Agreement provides means for protecting a variety of cultural objects or archeological finds beyond listing on the National Register.[96]

Moreover, with respect to all three arguments, the Tribe mischaracterizes the Board's ruling. The Board did not rely on the license amendment as a basis for its ruling that additional

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[92] *Id.* at 18.

[93] *Id.*

[94] *Id.* at 17.

[95] *Id.* at 17-18.

[96] *See, e.g.*, Ex. NRC-018-A, Programmatic Agreement ¶ 9 (construction will be halted for all "unanticipated discoveries" until they can be evaluated), ¶ 10 ("human remains" will be protected), ¶ 11 (disposition of artifacts).

cultural resources information is unavailable under NEPA. The license amendment provides that the signatories to the Programmatic Agreement and interested Tribes, even if not signatories, will receive thirty days prior notice of who will be monitoring future groundbreaking activities.[97] This notice provision does not alter the substantive rights of the signatories to the Programmatic Agreement or of the Tribe.

Therefore, the Tribe's arguments concerning the Programmatic Agreement-related license amendment do not raise a substantial question of fact, law, or policy, and we do not accept them for review.

d. The Board's Application of NEPA's "Rule of Reason"

Next, the Tribe challenges the Board's ruling because it claims that NEPA's "rule of reason" only applies to exclude a discussion of "remote and speculative" effects.[98] The Tribe argues that because there are certainly some Native American cultural resources on the site (some of which have already been identified) that could be adversely affected by this project, adverse impacts to them are not remote and speculative. Therefore, the Tribe contends, the rule of reason does not apply to the issues it raised in Contention 1A.[99]

We disagree with the Tribe's argument. In promulgating 40 C.F.R. § 1502.22, CEQ explained that the new regulation "requires that analysis of impacts in the face of unavailable information be grounded in the 'rule of reason.'"[100] Moreover, reviewing courts have applied the rule of reason to evaluate agencies' compliance throughout the NEPA process. For example, in

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[97] *See* LBP-19-10, 90 NRC at 344-45.

[98] Tribe Petition at 18-19.

[99] *Id.*

[100] 51 Fed. Reg. at 15,621; *see also* Council on Environment Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304, 43,332 (Jul. 6, 2020) (reiterating that the rule of reason applies when discussing incomplete or unavailable information).

Marsh v. Oregon Natural Resource Council, the U.S. Supreme Court found that an agency must use a rule of reason to decide whether new information warrants a supplemental environmental impact statement.[101] Similarly, the Court ruled in *Department of Transportation v. Public Citizen* that the rule of reason should govern the decision to prepare an environmental impact statement, where the statement would serve no purpose because the agency was required by law to undertake the action in question.[102] Thus, the Tribe's "rule of reason" argument does not raise a substantial question of law.

e. Whether the Board Improperly "Inserted Itself" into Negotiations or Was Biased in Staff's Favor

The Tribe argues that the Board improperly involved itself in settlement negotiations, used the Tribe's confidential settlement negotiations against the Tribe, and was biased in favor of the Staff.[103] The Tribe argues that it was improper for the Board to admit its own exhibits.[104] We find that these arguments do not present a prejudicial procedural error.

The Tribe's arguments that the Board improperly involved itself in settlement negotiations or improperly used settlement negotiations against the Tribe are unavailing.[105] The Board did not act as a settlement judge and in fact offered at several points in this proceeding to

[101] 490 U.S. 360, 373 (1989).

[102] 541 U.S. 752, 767 (2004); *see also Utahns for Better Transp. v. Dept. of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002) (reviewing court applies "rule of reason" in deciding whether claimed deficiencies in NEPA document are significant or merely "flyspecks").

[103] Tribe Petition at 20-21; *see also* Tribe Reply to the Staff at 4-5; Tribe Reply to Powertech at 4-5.

[104] Tribe Petition at 21-22.

[105] The Tribe argues that the Board forced it to participate in alternative dispute resolution (ADR), which is inaccurate. Tribe Petition at 21. However, the record does not reflect that the parties used ADR.

appoint a settlement judge.[106] In 2015, in its first initial decision, the Board acknowledged that it had no authority to direct the Staff in its NEPA duties, and it required monthly status updates from the Staff.[107] More than a year later, after the Staff's status reports showed no significant progress in the Staff's efforts to resolve its differences with the Tribe, the Board arranged for telephonic status calls.[108] Between October 2016 and April 2019, the Board held eleven on-the-record teleconferences with the parties concerning the status of the proceeding.[109] The Tribe's only specific argument challenging the Board's actions is that the Board forced the Tribe to accept the March 2018 Approach when it ruled on the parties cross-motions for summary disposition.[110] But the Board did not act inappropriately in ruling on the motions for summary disposition or in its underlying findings of fact that the Tribe had at one time accepted the March 2018 Approach. Ruling on motions, making findings of fact, and holding status conferences are within the scope of a Board's core responsibilities.

We disagree that the Board improperly "based its opinion regarding the reasonableness of the Tribe's negotiating position on letters exchanged during negotiations."[111] The Tribe argues that the Board's actions contravened Federal Rule of Evidence 408, which prohibits the admission of settlement negotiations into evidence in order "to prove or disprove the validity or

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[106] *See, e.g.*, LBP-18-5, 88 NRC at 135 n.255 (reminding the parties that they may request the appointment of a Settlement Judge and noting that the Board had suggested they do so in "a number of telephone conferences" as well as in LBP-17-9, 86 NRC at 209); *see also* Staff Answer Opposing Review at 21; Powertech Answer Opposing Review at 21.

[107] LBP-15-16, 81 NRC at 658.

[108] *See* Memorandum and Order (Requesting Scheduling Information for Telephone Conference Call) (Oct. 13, 2016), at 2 (unpublished).

[109] The transcripts of these teleconferences are publicly available in ADAMS.

[110] Tribe Petition at 20, 23 (citing LBP-18-5, 88 NRC at 135-36).

[111] *Id.* at 22.

amount of a disputed claim."[112] The Federal Rules of Evidence do not apply directly to our proceedings, although the boards look to them as guidance.[113] In any event, the Board did not violate the principle behind the federal rule. Rule 408 also provides that statements made during negotiations may be admitted for "another purpose," such as proving bias or prejudice.[114] The "another purpose" exception has been interpreted to include showing that a party acted in bad faith during the negotiations and establishing the intent of the settlement reached.[115] Here, the Board considered the communications between the parties not to establish the validity of a disputed claim but to determine whether the Tribe had unjustifiably refused to cooperate during the negotiations and whether Staff reasonably abandoned further negotiations as futile. In our view, the Board did not err in considering the parties' communications in that context.

The Tribe also does not show prejudicial procedural error in the Board's admission and reliance on its own exhibits.[116] The Board provided a list of twelve exhibits in an August 20, 2019, pretrial order, and the Tribe did not object to the admission of any of them.[117] The Tribe does not discuss the substance of the Board's exhibits or describe specifically how it was prejudiced by them. In our proceedings, the Board has an "inquisitorial role" in the development

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[112] *See* Fed. R. Evid. 408(a).

[113] *Southern California Edison Co.* (San Onofre Nuclear Generating Station Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983); *see, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

[114] *See* Fed. R. Evid. 408(b).

[115] *See, e.g.*, *Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000) (proof of bad faith); *Coakley & Williams Const., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349, 353-54 (4th Cir. 1992) (intent of settlement).

[116] Tribe Petition at 21-22.

[117] *See* Memorandum (Regarding Board Exhibits for Evidentiary Hearing on Contention 1A and Opportunity to Address Recent Judicial Decision) (Aug. 20, 2019) (unpublished).

of a complete record.[118] Our rules of procedure grant the Board the authority to receive evidence; examine witnesses; strike irrelevant, immaterial, unreliable, duplicative, or cumulative evidence; and take "any other action consistent" with applicable law in its conduct of proceedings.[119] We therefore disagree with the Tribe's argument that the Board's admission of its own exhibits constituted prejudicial procedural error.

3. LBP-17-9: Summary Disposition of Contention 1B

In LBP-17-9, the Board found that the Staff had made reasonable efforts under the NHPA to consult with the Tribe concerning the project's effects on cultural resources that may be located on the site, and it granted summary disposition to the Staff on Contention 1B. According to the Tribe, the Board concluded that the Staff had met its duty to consult based on "a single . . . face to face meeting that occurred on May 16, 2016, one follow up conference call on January 31, 2017, and an exchange of letters [that] even the Board characterized as lacking substance."[120] The Tribe also argues that the "events that have transpired since . . . confirm the inadequate effort to address historic and cultural resources under NEPA that flow from the failure to satisfy NHPA standards."

As an initial matter, the Tribe's arguments that the Staff had not identified historic properties in compliance with the NHPA, challenges the Board's finding in LBP-15-16, not its ruling in LBP-17-9.[121] The argument is therefore impermissibly late.

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[118] *Vermont Yankee*, CLI-10-17, 72 NRC at 47-48.

[119] 10 C.F.R. § 2.319(d), (g), (s).

[120] Tribe Petition at 24 (citing LBP-17-9, 86 NRC at 190).

[121] *Id.* In LBP-15-16, the Board found that "NRC Staff has complied with the NHPA requirement to make a good faith and reasonable effort to identify properties that are eligible for inclusion in the National Register of Historic Places within the Dewey-Burdock ISL project area." LBP-15-16, 81 NRC at 654.

Whether the Staff's attempts to consult with the Tribe adequately fulfilled its NHPA consultation duties is a question of fact subject to the "clear error" standard of review. Moreover, the Tribe's references to the Staff's actions subsequent to the summary disposition ruling are irrelevant to the Board's conclusion regarding summary disposition. The Tribe does not meet the "clear error" standard; it does not explain how the Board's findings of fact "are not plausible." We therefore decline to take review of this claim.

C. Consolidated Intervenors Petition for Review

The Consolidated Intervenors seek review of the Board's merits decision in LBP-19-10, its summary disposition ruling in LBP-17-9, and its August 12, 2019, order with a single argument. They argue that the Staff has a responsibility under NEPA to "preserve important historic, cultural, and natural aspects of our national heritage" regardless of whether a "federally recognized tribe appears to assert and prosecute a claim."[122] They argue that the Staff's approach, "now adopted by the Board[,] makes the consideration of cultural resources values entirely dependent upon the active participation of the [Oglala Sioux Tribe]."[123]

Contrary to these claims, the Staff and the Board have not put the onus of identifying cultural resources on a single Native American tribe. Powertech submitted a Class III cultural resources survey with its application.[124] As the Board recognized in its first initial decision, a Class III survey can identify a property's eligibility to be included on the National Register of Historic Places but "wouldn't necessarily identify all of the [Native American cultural and religious] resources primarily because some knowledge [must be] provided by the Native

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[122] Consolidated Intervenors Petition at 1-2 (quoting *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 530 (D.C. Cir. 2018)).

[123] *Id.* at 2.

[124] Ex. APP-009, Level II Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota (Mar. 2008) (ML14240A418).

American groups themselves."[125] The Staff began its efforts to consult with various affected Tribes in 2011, and a field survey was conducted on the site with three Tribes (although not the Oglala Sioux Tribe) participating.[126] And the March 2018 Approach that the Staff proposed would have involved qualified archeologists, not solely tribal members, to complete the survey, and it would have provided an opportunity for other tribes to participate.[127] Therefore, Consolidated Intervenors' assertions that consideration of cultural resources was entirely dependent on the Tribe are inconsistent with the record.

Accordingly, we find no clear error in the Board's ruling that the Staff has satisfied its NEPA responsibilities, and we deny the Consolidated Intervenors' petition for review.

III. CONCLUSION

For the foregoing reasons, we *deny* the petitions for review.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of October 2020.

[125] LBP-15-16, 81 NRC at 653 (quoting Tr. at 762-63).

[126] *See id.* at 644-49.

[127] *See* Ex. NRC-192, March 2018 Approach, at 2-3.

Additional Views of Chairman Svinicki and Commissioner Caputo

We fully agree with the majority's determination that neither petitioner provided a sufficient reason to take review of the Board's holding in this proceeding. The Board's holding rests on the observation that "NEPA's rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis."[1] In such circumstances, the agency must "undertake reasonable efforts to obtain unavailable information."[2] The Board found that "although unsuccessful, the NRC Staff acted reasonably in seeking to obtain information from the Tribe regarding the location and significance of Tribal cultural resources on the Dewey-Burdock site for the purpose of its NEPA impacts analysis."[3] We write separately to emphasize that the Staff's efforts went far beyond what was required by any "rule of reason" worthy of the name.[4]

The conclusion to this proceeding illustrates the fruitlessness of compelling the Staff to take extraordinary measures to gather missing information under NEPA when clearly reasonable steps have failed. This quixotic search for more information followed from the Board's and Commission's failure to articulate clearly the attributes of a reasonable effort to obtain missing information. The details of the failed consultation, adjudication, and NEPA process in the instant case are worth examining because they demonstrate significant and recurring flaws in our process. Until agency adjudicators effectively address these short

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[1] LBP-19-10, 90 NRC at 314 (citing National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986)).

[2] *Id*. at 316.

[3] *Id*. at 356.

[4] Chairman Svinicki has made this point many times over the course of this now ten-year proceeding. CLI-19-09, 90 NRC 121, 136 (2019) (Additional Views of Chairman Svinicki); CLI-18-7, 88 NRC at 11 (Chairman Svinicki, Additional Views); CLI-16-20, 84 NRC at 263-68 (Commissioner Svinicki, dissenting in part).

comings, efficiency and balance will elude our NEPA reviews when the agency lacks complete information.

A. The Staff's Efforts to Obtain Information on Cultural Resources

1. Four Years of Consultation

The Staff began its search for information regarding cultural resources many years ago. In early 2010, the Staff contacted the South Dakota State Historic Preservation Officer, who identified twenty Native American Tribes "that might attach historic, cultural, and religious significance to historic properties within the Dewey-Burdock ISL Project area."[5] The Staff sent letters to these Tribes that asked for assistance in identifying cultural resources on March 19, 2010, September 10, 2010, and March 4, 2011.[6] On June 8, 2011, at the Prairie Winds Casino and Hotel on Pine Ridge Reservation, the Staff held a meeting with six Tribes to gather information informally.[7] The Staff held a follow up meeting on February 14-15, 2012, in Rapid City, South Dakota; thirteen Tribes attended.[8] In the following months, the Staff continued to exchange letters and emails with tribal entities.[9]

Between June 19, 2012, and October 19, 2012, the Staff received and considered a variety of proposals to conduct a survey of the site.[10] As part of this effort, on September 5, 2012, the Staff held a meeting in Bismarck, North Dakota, with representatives from seven Tribes to further discuss "a statement of work to identify religious and cultural properties within

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[5] LBP-15-16, 81 NRC at 644.

[6] *Id.*

[7] *Id.* at 645.

[8] *Id.*

[9] *Id.* at 646.

[10] *Id.* at 646-47.

the area of potential effects."[11] Notably, the Board found that the survey approach favored by the Oglala Sioux Tribe, which would have cost over one million dollars to survey a fraction of the site, was "patently unreasonable."[12] At the end of the year, the NRC Staff stated that it intended to conduct an alternate field survey in the spring.[13] On February 8, 2013, the Staff "invited twenty-three tribes to participate in a field survey between April 1 and May 1, 2013, and described procedures for site access, and compensation for survey participation."[14]

The Oglala Sioux Tribe objected to the terms of the survey, which began on April 1, 2013; nonetheless, seven Tribes participated in the survey, and three of those Tribes ultimately provided survey reports to the NRC.[15] "The survey reports documented sites of religious and cultural significance identified during site surveys [and] mitigation measures recommended for each identified site."[16] The Staff issued the final Environmental Impact Statement in January of 2014, which contained the three reports arising from the April 2013 survey.[17]

2. Is Four Years Enough?

Before the Board, the Staff did not argue that the Final Environmental Impact Statement catalogued and provided mitigation measures for all potential cultural resources that could be present on site. Instead, the Staff contended that it complied with NEPA by making "'a reasonable and good faith effort – an effort that lasted almost 4 years – to obtain information on

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[11] *Id.* at 646.

[12] *Id.* at 657 & n.229; LBP-19-10, 90 NRC at 331 n.227).

[13] LBP-15-16, 81 NRC at 648.

[14] *Id.*

[15] *Id.* at 648-49, 652.

[16] *Id.* at 649.

[17] *Id.*

religious and cultural resources that are significant to the tribes.'"[18] However, rather than consider the Staff's plea, the Board simply concluded, "the FSEIS in this proceeding does not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of other consulting Native American tribes."[19] Thus, the Board found the Staff's review did not comport with NEPA.[20] The Board noted that the Staff "can remedy this deficiency . . . by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic, or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project."[21] However, the Board provided no guidance to the Staff or parties about what efforts would be sufficient to comply with NEPA's rule of reason in the event that the parties held to their clearly established positions and no additional survey occurred.

On appeal, the Staff argued that "the Board misapplied NEPA's hard-look standard as a matter of law, under which the Board should assess whether the Staff 'made reasonable efforts' to obtain complete information on the cultural resources at issue here."[22] The Staff's appeal posed a critical legal question, which the Commission reviews *de novo*: whether the Board applied the appropriate legal standards in considering if four years of work to obtain cultural resources information was a sufficient effort under NEPA's "rule of reason." Rather than answer, the majority sidestepped this foundational inquiry entirely and, over Chairman Svinicki's dissent, simply observed, "the fundamental issue here – whether the Staff complied with NEPA

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[18] *Id.* at 651 (quoting *NRC Staff's Reply Brief* (Jan. 29, 2015) at 5).

[19] *Id.* at 655.

[20] *Id.*

[21] *Id.* at 657-58.

[22] CLI-16-20, 84 NRC at 247 (quoting *NRC Staff's Petition for Review of LBP-15-16* (May 26, 2015) at 17-18).

– is inherently factual."[23] Moreover, as Chairman Svinicki noted in her dissenting opinion, the Board's holding that the Oglala Sioux Tribe's proposal for a cultural resources was "patently unreasonable" logically entailed a conclusion that the information that would be gleaned from that survey was not reasonably available.[24] Thus, the result of the Commission's and Board's rulings left the Staff with no recourse but to double down on the same unavailing efforts with the Tribe when the Tribe had already indicated that the information sought was not reasonably available. Unsurprisingly, the ensuing four years of consultation would prove no more productive than the first four years.

3. Four More Years

The Staff renewed its efforts to obtain information on cultural resources on June 23, 2015, when the Staff sent a letter to the Oglala Sioux Tribes asking to reinitiate government-to-government consultations.[25] The parties exchanged correspondence and held another meeting in Pine Ridge, South Dakota on May 19, 2016.[26] Concerned by the lack of progress in consultation, the Board convened the first of a series of teleconferences on November 7, 2016; shortly afterwards, on November 23, 2016, the Staff invited the Tribe to join a teleconference on the parameters of a cultural survey.[27] The teleconference occurred on January 31, 2017, but the Staff and Tribe were again unable to agree on a survey methodology.[28] Thereafter, the parties exchanged letters through the spring of 2017, which culminated in a letter from the Tribe on May 31, 2017, that detailed the Tribe's ongoing objections to the Staff's proposed

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[23] *Id.*

[24] *Id.* at 264-65 (Commissioner Svinicki, dissenting in part).

[25] LBP-17-9, 86 NRC at 179.

[26] LBP-19-10, 90 NRC at 300.

[27] *Id.* at 301.

[28] LBP-17-9, 86 NRC at 181.

methodology.[29] After receipt of the letter, the Staff concluded that additional consultation would be "'unlikely to result in a mutually acceptable settlement of the dispute.'"[30] Thus, the Staff moved for summary disposition, which the Board denied with respect to the Staff's NEPA obligations.[31]

Thereafter, the Board continued to hold teleconferences with the parties to monitor progress on resolving the contention.[32] At a November 16, 2017, teleconference the Staff "revealed that it was working on a path forward that it hoped to present to the other parties in the next several weeks."[33] On December 6, 2017, the Staff sent a new proposed approach to the Tribe and Consolidated Intervenors, who expressed a "tentative approval" of the proposal in a follow-on December 12, 2017, teleconference with the Board. On January 19, 2018, the other parties provided written responses to the Staff proposal, which the Staff took into account in the finalized approach it provided to the parties on March 16, 2018, the "March 2018 Approach."[34] At a further teleconference with the Board, all parties expressed comfort with the parameters of the March 2018 Approach.[35]

Among other things, the March 2018 Approach called for the parties to begin "the field survey process in mid-June 2018 for a two week period" and also provided for a follow-on

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[29] *Id.* at 182.

[30] *Id.* (quoting Letter from Cinthya I Román, Chief, Environmental Review Branch, Division of Fuel Cycle, Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPA, Oglala Sioux Tribe at 2 (July 24, 2017)).

[31] *Id.* at 201.

[32] LBP-19-10, 90 NRC at 301.

[33] *Id.*

[34] *Id.* at 302-03.

[35] *Id.* at 303.

survey in September of that year.[36] Under the March 2018 Approach, the Staff would prepare a draft survey report in October of 2018, with an opportunity for Tribal review through late December, followed by publication of a draft supplement to the FSEIS in February 2019 and a final supplement in May.[37] Shortly before the June survey period began, "the Oglala Sioux Tribe presented the NRC Staff with an alternative survey proposal."[38] The alternate proposal called for visits by tribal elders "over several days during the different seasons of the year"; field work that would last over a year; and a budget of over $2 million.[39] The Staff "responded by indicating that it considered the Tribe's alternative survey methodology to be a constructive rejection of the March 2018 Approach and terminated implementation of the March 2018 Approach."[40] In light of the failed survey attempt, the Staff and Oglala Sioux Tribe both moved for summary disposition; but the Board again declined to grant summary disposition and provided two options to resolve the contention: further negotiation to implement the March 2018 Approach or an evidentiary hearing.[41]

Once more, the Staff sought to obtain the missing information through further discussions with the Oglala Sioux Tribe. On November 21, 2018, the Staff sent the Oglala Sioux Tribe and other Tribes a letter indicating that the Staff would resume efforts to complete the March 2018 Approach.[42] The Tribe responded on January 11, 2019, in a letter that raised concerns with the Staff's approach. The following month, the Staff developed a Proposed Draft

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 304.

[40] *Id.* at 305.

[41] *Id.* at 305-06.

[42] *Id.* at 307.

Cultural Resources Site Survey Methodology (February 2019 Methodology), which it provided to the Oglala Sioux Tribe for review.[43] The Staff met at the Pine Ridge Reservation in South Dakota with the Oglala Sioux Tribal Historic Preservation Advisory Council and THPOs from other Sioux Tribes to discuss the February 2019 Methodology.[44] During the meeting, the Tribes voiced concerns with the February 2019 Methodology as well as the March 2018 Approach.[45] Once more, the parties exchanged letters in which the Staff committed to working within the framework of the March 2018 Approach and the Tribe cautioned that it did not agree to a rigid application of the March 2018 Approach.[46] Once again at impasse, the Staff advised the Board during a subsequent teleconference on March 21, 2019, that "'the differences that remain were so fundamental that it was not feasible to have further negotiation meetings'" and that the Staff would pursue the option for an evidentiary hearing.[47] The evidentiary hearing that is the subject of the instant appeal followed.

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[43] *Id.* at 308.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 308-09.

[47] *Id.* at 309-10 (quoting Tr. 1564-65, 1619-20 (Mar. 21, 2019)).

B. Analysis

The Council on Environmental Quality recently issued a final rule to update its regulations on NEPA compliance.[48] Although we are not bound by CEQ regulations, the NRC gives them "substantial deference" in applying NEPA.[49] The CEQ rule added a new provision specifying a presumptive two year time limit for preparing Environmental Impact Statements.[50] While this would not be an inflexible rule, allowing a senior agency official to waive its applicability for a given project, it demonstrates the relative amount of time and effort expected of agencies in preparing an EIS.[51]

This is in keeping with Federal Court's descriptions of NEPA's limited requirements. The Supreme Court has clarified that NEPA is a procedural statute: it "does not mandate particular results, but simply prescribes the necessary process."[52] The purpose of the EIS is (1) to ensure that the agency "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and (2) to guarantee "that the relevant information will be made available to the larger audience."[53] The Supreme Court has also cautioned, "The scope of the agency's inquiries must remain manageable if NEPA's goal of ensuring a fully informed and well considered decision is to be accomplished."[54] Likewise, the

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[48] Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule, 85 Fed. Reg. 43,304 (Jul. 16, 2020).

[49] *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007).

[50] 85 Fed. Reg. at 43,362-63.

[51] *Id.*

[52] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[53] *Id.* at 349.

[54] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quotations omitted).

First Circuit has emphasized that an environmental impact statement "is not, after all, a research document."[55]

A ten-year adjudicatory process to comply with NEPA in this proceeding is difficult to reconcile with these interpretations of NEPA. Clearly, the additional efforts at negotiating a survey methodology came to nothing, and the Oglala Sioux Tribe remained consistent in its position that a satisfactory survey would require resources deemed unreasonable by the Board.[56] When the Staff, tasked with preparing the EIS and reasonably presumed to have the competency and expertise in NEPA matters sufficient for the job, advised us that it believed it could not obtain information on cultural resources despite having undertaken what it considered reasonable efforts, it should have rung alarm bells for agency decisionmakers. In essence, the Staff was informing the Commission that it did not know how to find the missing information through reasonable efforts. Repeatedly, the Board and Commission response to the Staff argument that it could not obtain information on cultural resources consisted of no more than ordering the Staff to try again. Obviously, a successful survey would have discharged the agency's NEPA obligations; but completion of that survey was never fully in the agency's hands. The agency could only control the effort it took to complete the survey. A more appropriate response would have considered whether the initial effort at consultation was a reasonable one and if not, what the Staff could have done differently that would have been reasonable (even if it never led to the hoped for survey). Without such guidance, it is unsurprising that the parties wandered aimlessly through nearly a decade of discussion. Ultimately, the agency is left with nothing to show for the ten years of the parties' wasted time and resources.

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[55] *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 13 (1st Cir. 2008).

[56] *Compare* LBP-19-10, 90 NRC at 331 n.227) *with id.* at 12.

The NRC has frequently addressed the difficulties of producing an Environmental Impact Statement while missing information.[57] Most recently, the Commission considered this issue in a companion case to this order, *Crow Butte*. *Crow Butte* also involved the Staff's efforts to secure the Oglala Sioux Tribe's assistance to identify TCPs impacted by uranium recovery operations. We dissented from a similarly aimless remand in *Crow Butte* and instead would have found the Staff's efforts met NEPA's rule of reason because the Staff 1) identified the source of the missing information, 2) undertook reasonable efforts to acquire the information from that source, and 3) discontinued those efforts upon learning that the information could not be reasonably obtained.[58] In our view, the Staff's initial efforts to obtain cultural resources information in this proceeding would also meet these basic requirements. First, the Staff identified the source that was most likely to be able to provide the missing information by contacting the South Dakota SHPO to identify Tribes with a connection to the site.[59] Second, the Staff took steps that were likely to lead to obtaining the missing information, in this case by seeking to conduct an on-site cultural resources survey.[60] Third, the Staff discontinued further

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[57] *E.g. Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438-44 (2011) (considering claim that applicant must provide a probabilistic analysis of new seismic information or show that the cost of such analysis would be exorbitant); *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008) (considering claim that NRC did not fully disclose potential radiological impacts of a terrorist attack in its supplemental environmental impact statement); *North Anna,* CLI-07-27, 66 NRC at 235-36 (discussing the extent to which missing information constitutes a "fatal flaw" to a NEPA analysis for an Early Site Permit).

[58] *Crow Butte Resources Inc.* (In Situ Leach Uranium Recovery Facility), CLI-20-__, 92 NRC at __ (slip op. at __) (2020) (Chairman Svinicki and Commissioner Caputo, dissenting).

[59] LBP-15-16, 81 NRC at 644.

[60] *See supra* notes 5-17 and accompanying text.

efforts upon learning that the information could not be reasonably obtained.[61] Had the majority simply invoked such a straightforward application of NEPA's rule of reason earlier in this proceeding, years of wasted effort and resources may have been averted.

Moreover, as discussed by us in our *Crow Butte* dissenting opinion, the Commission perpetuates a veil of mystery around the question of what level of effort to acquire missing information is reasonable. As a result, licensing applicants and the NRC staff face the ongoing prospect that a demand for additional detail in NEPA documents may give rise to a years-long sojourn with no clear destination. Thus, our adjudicatory process remains vulnerable to the type of profoundly regrettable, decade-long delay demonstrated by this proceeding. Given the complex and time-sensitive applications on the agency's licensing horizon, we can ill-afford to sustain this persistent trap for those who wander into our jurisprudence.

[61] LBP-19-10, 90 NRC at 331 & n. 227) (noting that the Tribe's suggested survey approach in 2012 entailed "unreasonable" costs); LBP-15-16, 81 NRC at 657 (finding aspects of the Tribe's proposed survey to be "patently unreasonable").

Commissioner Baran, Dissenting in Part

I agree with the majority that it was reasonable for the Board to conclude that the cultural resources information it found lacking in LBP-15-16 is not available for National Environmental Policy Act (NEPA) purposes. However, I dissent from the majority's holding that the Staff need not issue a supplement to the Final Supplemental Environmental Impact Statement (FSEIS). The Oglala Sioux Tribe contends that it is improper for a NEPA environmental analysis to be augmented after the fact through the record of adjudication. The Commission should grant review of this aspect of the petition because the Tribe has raised a substantial and important question of law and policy. We should conclude that the Staff must supplement the FEIS with an explanation of its determination that additional cultural resources information is unavailable. The Board previously found that the Staff's FSEIS did not meet the requirements of NEPA because the FSEIS was deficient with respect to the effects of the licensing action on Native American cultural, religious, and historic resources.[1] Without a supplement explaining why this information is unavailable, the significant deficiency will remain uncorrected and the agency will not meet its NEPA obligations.

NRC cannot avoid supplementing the FEIS by allowing the significant deficiencies of the environmental review to be corrected by adjudicatory proceedings conducted *after* the Powertech license was issued. As the Commission has observed many times, NEPA is a procedural statute.[2] It establishes a process to ensure that, when an agency makes a decision that could affect the environment, that decision is informed by a thorough evaluation of the expected environmental impacts. A basic premise of the statute is that informed

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[1] LBP-15-16, 81 NRC at 708, 655-58. The Board also identified a NEPA deficiency with respect to hydrogeological information, the subject of Contention 3, and conditioned Powertech's license to cure this deficiency. *See id.* at 679, 681, 709.

[2] *See e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 (2011).

decisionmaking will help protect the environment by forcing agencies to consider the consequences of potential actions as well as alternatives that could be less environmentally damaging. That commonsense approach simply does not work if the agency decision precedes the environmental review. Thus, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[3] When the Commission allows a Board to correct a significantly inadequate NEPA document through augmentation *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

Here, the licensing decision was made on April 8, 2014, when the Staff issued a Part 40 source material license to Powertech. There was nothing provisional about that license. After Powertech received the license, it was authorized by NRC to possess source material. Like many agency decisions – whether they be licenses, orders, or rulemakings – issuance of the Powertech license could be challenged in an agency adjudicatory proceeding and in federal court. But the possibility of judicial (or quasi-judicial) review does not change the fact that the licensing decision was made on April 8, 2014. The Board's hearing on whether the information was unavailable did not take place until August 2019 – more than five years *after* the agency's licensing decision was made. The Board's final initial decision finding the information unavailable was not issued until four months later, on December 12, 2019. Relying on the Board's August 2019 hearing and December 2019 decision to cure the significant deficiencies of a March 2014 FSEIS that the Staff relied on to issue an April 2014 license would not comply with the basic requirements of NEPA.

In two recent cases, the D.C. Circuit Court of Appeals made it clear that it does not approve of the Commission's current practice of allowing for the augmentation of an inadequate NEPA environmental review after the decision to issue a license has already been made.

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[3] *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

In *NRDC v. NRC*, the Court examined this practice. While the Court of Appeals found that there was no concrete harm in that particular case, the Court stated:

> We do not mean to imply the procedure the Board followed was ideal or even desirable. Certainly it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued.[4]

The second case is the very one before us now. In *Oglala Sioux Tribe*, the Court of Appeals went even further than it had in *NRDC v. NRC* in broadly criticizing the agency's practice. The Court explained:

> The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm.[5]

The Court added:

> The agency's decision in this case and its apparent practice are contrary to NEPA. The statute's requirement that a detailed environmental impact statement be made for a "proposed" action make clear that agencies must take the required hard look *before* taking that action.[6]

The Court of Appeals held that "once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm."[7] It then remanded the case to the Commission to decide whether to leave Powertech's license in place.

The Court of Appeals decisions are a strong signal that the Commission must act to bring the agency's doctrine and practice into compliance with NEPA. The Board is correct that,

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[4] *NRDC v. NRC*, 879 F.3d 1202, 1212 (D.C. Cir. 2018).

[5] *Oglala Sioux Tribe*, 896 F.3d at 523.

[6] *Id.* at 532.

[7] *Id.* at 538.

for many years, the Commission has permitted NEPA environmental reviews to be augmented by adjudicatory decisions occurring after issuance of a materials license. But by allowing the significant deficiencies of NEPA analyses to be corrected by adjudicatory proceedings *after* a license has already been issued, the Commission has put NRC on course to repeatedly and predictably violate a core requirement of NEPA. We have a responsibility to avoid this result.

Therefore, we should now hold that the Board cannot correct significant deficiencies of a NEPA environmental review through the hearing process after a licensing action has already been taken in reliance on the deficient NEPA analysis.[8]

Aside from bringing the agency into compliance with NEPA, requiring the Staff to supplement the FSEIS would also provide interested stakeholders with the opportunity to comment on the Staff's determination that additional cultural resources information is unavailable. Although adjudicatory hearings can provide for "more rigorous public scrutiny" of a NEPA environmental review that a public comment period, they are also much more restrictive.[9] Many interested stakeholders likely would be unable to demonstrate standing to intervene or to submit a contention that meets NRC's stringent admissibility standards. Or they may lack the financial resources to participate in an adjudicatory hearing. Yet, these stakeholders may offer insightful and valuable comments for the agency to consider as part of a public comment period on a supplement to the FSEIS.

For these reasons, I would grant review of this aspect of the Oglala Sioux Tribe's petition and direct the Staff to supplement the FEIS with an explanation of (1) its determination that

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[8] This approach would not require completing the hearing before making a licensing decision, and it would not change Commission jurisprudence allowing for augmentation of the environmental record *before* a licensing action is taken. Rather, if a licensing decision is based on an environmental review that the Board or Commission later finds to be significantly deficient, then after-the-fact augmentation of the environmental review with the hearing record is not available as an option to correct the deficiency.

[9] *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001).

additional cultural resources information is unavailable and (2) the relevance of the unavailable information to evaluating the reasonably foreseeable significant adverse impacts on the human environment.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-09)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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DOCKET NO. 40-9075-MLA
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Dated at Rockville, Maryland,
This 8th day of October 2020.